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Supreme Court, U.S.
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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

KENNETH ROBERTS,

Petitioner,

v.

KATHLEEN MADIGAN and ADAMS COUNTY SCHOOL DISTRICT NO. 50,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Establishment Clause require a public school to censor a fifth-grade classroom library by banning, from among some 240 volumes, the two books *The Bible in Pictures* and *The Story of Jesus?*

2. Does the Establishment Clause require a public school to censor the personal reading selections of a fifth-grade teacher by forbidding him to read the Bible discreetly and silently to himself during a 15-minute silent reading period in the classroom?

3. Does the Establishment Clause require a fifth-grade public school teacher to hide the Bible in his desk during school hours instead of leaving the Bible among other volumes on his cluttered desk top?

4. Did the public school principal and school district violate the neutrality requirement of the Establishment Clause by ordering a fifth-grade teacher to: a) remove two allegedly Christian books from his classroom library of some 240 volumes; b) stop reading the Bible discreetly and silently to himself during a silent reading period; and, c) hide the Bible in his desk during school hours?

5. Did the public school principal and school district violate the rights of a fifth-grade teacher to free speech and academic freedom under the First Amendment by ordering him to: a) remove two allegedly Christian books from his classroom library of some 240 volumes; b) stop reading the Bible discreetly and silently to himself during a silent reading period; and, c) hide the Bible in his desk during school hours?

PARTIES

In addition to petitioner Kenneth Roberts, the following individuals were also appellants in the court of appeals and plaintiffs in the district court: Marc and Zay Nelson and their daughters Kelly and Amy Nelson; Debra Jean White and her daughter Kelly White.

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DECISIONS BELOW

The decision of the district court is reported as *Roberts v. Madigan*, 702 F. Supp. 1505 (D. Colo. 1989). The decision of the court of appeals is reported as *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990).

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on December 17, 1990. This Court has jurisdiction, under 28 U.S.C. § 1254(1), to review the judgment of the court of appeals.

CONSTITUTIONAL PROVISIONS

The first amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The first section of the fourteenth amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

The underlying action in this case is a civil rights suit for damages and for declaratory and injunctive relief, brought under 42 U.S.C. § 1983. Federal jurisdiction in the district court was based on 28 U.S.C. §§ 1331, 1343 (3) and (4).

Petitioner Kenneth Roberts—plaintiff in the district court [1]—was at all relevant times a fifth-grade teacher at the Berkeley Gardens Elementary School. Respondent Kathleen Madigan—defendant in the district court—was at all relevant times the principal of Berkeley Gardens

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[1] Additional plaintiffs in the district court were Marc and Zay Nelson and their daughters Kelly and Amy Nelson, and Debra Jean White and her daughter Kelly White. These plaintiffs were appellants before the court of appeals but are not parties before this Court.

Elementary School. Respondent Adams County School District No. 50—also a defendant in the district court—is a public school district in Westminster, Colorado and was at all relevant times petitioner Roberts's employer.

At issue in the present case is the constitutional propriety of certain censorship actions taken by the respondent school principal and school district allegedly to fulfill the mandates of the Establishment Clause.

A. Statement of Facts

At the time this litigation began, petitioner Ken Roberts was teaching fifth grade students at the Berkeley Gardens Elementary School, a public school in Adams County School District No. 50. Roberts had already been a public school teacher for over 18 years.[2]

1. Censorship of the classroom library

Among the subjects Ken Roberts taught to his fifth grade students was reading. Tr. 21. Roberts spent about one hour and forty-five minutes each day on this subject, Tr. 22, beginning with fifteen minutes of silent reading, *id.* During this silent reading period, students would read books of their own choosing. Tr. 24. Students could bring books from home to read, or they could choose books from the school library, or they could choose from the collection of books Roberts maintained in his classroom. Tr. 23. (Like many other teachers at Berkeley Gardens Elementary School, Roberts had a "classroom library." Tr. 26.)

The school library contained, among several thousand volumes, Tr. 84, some twenty-five or thirty religious books, Tr. 85, 95. In particular, the school library con-

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[2] Roberts is now in his twenty-first year as a public school teacher. He currently teaches the second grade at a different elementary school in the same school district.

tained a Bible, Tr. 80, and a children's Bible, Tr. 84, 131. The library in Ken Roberts's classroom contained some 240 volumes, Tr. 25, including a wide variety of fiction, nonfiction, science, biography, and history books, Tr. 25. (A complete list of the titles is found in the Appendix. *See* App. 68a.) Among these books were classics such as *Tom Sawyer*, *The Wizard of Oz*, and *Charlotte's Web*, as well as less familiar books such as *Our Amazing World of Nature* and *The Mystery of the Whispering Mummy*. Also in the classroom library were two books that contained discussions of Indian religions, a book on Greek mythology, and *The Bible in Pictures* and *The Story of Jesus*. Tr. 51.

On the evening of September 10, 1987, the Berkeley Gardens Elementary School held an open house for parents. Tr. 27-28. One parent, after visiting Ken Roberts's classroom and examining the contents of the classroom library, complained to the school principal about two books in the collection: *The Bible in Pictures* and *The Story of Jesus*. Tr. 28, 117-19.

The principal, respondent Kathleen Madigan, confronted Roberts about these books that same evening. Tr. 28. Madigan examined the books briefly, but did not ask Roberts how the books were used in the classroom. Tr. 29-30. Instead, Madigan simply ordered Roberts to remove these two books from the collection "because of separation of church and state." Tr. 28, 30, 118-20. Roberts immediately complied with this order, placing the two books in a box out of sight and out of the reach of the students. Tr. 29.[3]

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[3] Madigan simultaneously ordered Roberts to remove a poster from the classroom wall. Tr. 30, 118-19. This poster depicted a nature scene—Colorado mountains and a lake—and stated at the bottom, "You only have to open your eyes to see the hand of God." Tr. 31.

2. Censorship of Ken Roberts's personal reading material

Like other teachers at Berkeley Gardens Elementary School, Ken Roberts kept various books and papers on his desk, including some "personal non-curriculum related books." Tr. 32, 34, 65-66. Among the books on Roberts's desk were *Where the Sidewalk Ends*, *Events that Shook the World*, and a couple of books about the definitions of children's names. Tr. 34, 54, 65.

Roberts also kept on his desk a Bible, which he had signed out of the Tennyson Knolls Elementary School library. Tr. 32, 52. This Bible was not prominently displayed, and in fact was often buried among other books and papers. Tr. 66. Roberts read from the Bible during free time and lunch breaks. Tr. 33.

During the silent classroom reading period, Roberts would sometimes read silently to himself in order to model reading for the students. Tr. 33. Roberts has read various books during this silent reading period, including *My Side of the Mountain* and *Eating Fried Worms*. Tr. 34. He has also read from a book about the life of Buddha, Tr. 34, from books about Indians that include discussions of the religion of the Indians, *id.*, and from the Bible he kept on his desk, Tr. 33.

Roberts never read from the Bible to his students. Tr. 32. Nor did Roberts ever announce to the students that he was reading from the Bible. Tr. 33. Roberts remained at his desk when reading the Bible, Tr. 33; when so seated, students sitting at their own desks could not see what particular book Roberts was reading. Tr. 151-52. Roberts further testified that it would be "unethical" for a public school teacher to teach the Bible with a view to converting the students. Tr. 41. Said Roberts: "I have never done it, and I don't intend to start it." *Id.*

On the same evening that the school principal, Kathleen Madigan, ordered Roberts to remove the two books from the classroom library, she also ordered Roberts to hide

the Bible in his desk during class hours. Tr. 32, 120. As with the two classroom library books, Madigan did not ask Roberts how he used the Bible or whether he read aloud from it. Tr. 36. Madigan had never ordered Roberts to keep any other book off his desk top. Tr. 65. Nor has Madigan ever told Roberts that he could only read certain books during the silent reading period. Tr. 68.[4]

Principal Madigan subsequently confirmed, in a written memorandum dated September 24, 1987, her orders to Roberts to remove *The Bible in Pictures* and *The Story of Jesus* from the classroom and to keep the Bible concealed in his desk during school hours (8:00 a.m.-3:30 p.m.). App. 65a. This memorandum concluded as follows:

> The law is clear that religion may not be taught in a public school. To avoid the appearance of teaching religion, I have given you this directive. Failure to comply with this directive will be considered insubordination and could result in disciplinary action.

Id.

3. Censorship of the Bible from the school library

During the same month that the school principal ordered Ken Roberts to remove *The Story of Jesus* and *The Bible in Pictures* from his classroom library and also ordered Roberts to conceal in his desk the Bible he used for personal reading, the principal went to the school library in search of the copy of the Bible kept there. Tr. 72, 74, 81, 129.

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[4] Principal Madigan claims that on two prior occasions she had directed Roberts not to read the Bible during class time and to keep the Bible inside his desk. Tr. 115-17. Roberts recalled no such order, and testified that had Madigan given such a directive, he would have complied. Tr. 35, 121. It is undisputed, however, that Madigan ordered the Bible, and only the Bible, to be kept off Roberts's desk top during class hours. Tr. 65.

The librarian handed Madigan the reference copy of the Bible, and Madigan walked out of the library. Tr. 74, 82. A music teacher present at the time testified that Madigan told the librarian, "hand that to me right now, you can't have that on the shelf." Tr. 74. The music teacher further testified that Madigan took the Bible out of the library. Tr. 74-75. The school librarian testified that Madigan did not give the Bible back and that the Bible remained missing at the time of trial. Tr. 82. (Madigan denied that she took the Bible from the library that day. Tr. 130. The district court, however, ordered respondents to replace the missing Bible and enjoined respondents from removing the Bible in the future. *Roberts v. Madigan*, 702 F. Supp. 1505, 1519 (D. Colo. 1989). (App. 60a.))

The record does not reveal what religion, if any, Ken Roberts professes. There have never been any allegations or complaints that Roberts was teaching religion to, or proselytizing, his students. Tr. 40.

B. Course of Proceedings

Kenneth Roberts filed suit in the United States District Court for the District of Colorado, naming respondents Madigan and Adams County School Dist. No. 50 as defendants. Roberts sought damages, an injunction, and a declaration that by banning the two books *The Story of Jesus* and *The Bible in Pictures* from Roberts's classroom library, by forbidding Roberts to read the Bible silently to himself, by ordering Roberts to hide the Bible in his desk during the school day, and by removing the reference copy of the Bible in the school library, the principal and school district had violated the Free Speech and Establishment Clauses of the First Amendments, the Equal Protection Clause of the Fourteenth Amendment, and the rights secured to Roberts under 42 U.S.C. § 1983.

The district court consolidated the hearing on preliminary injunctive relief with the trial on the merits.

Roberts v. Madigan, 702 F. Supp. 1505, 1508 (D. Colo. 1989) (App. 37a.) After hearing evidence and arguments, the district court ordered respondents to replace the missing Bible in the school library; the court also permanently enjoined respondents from removing that Bible in the future. *Id.* (App. 60a.)[5] The district court dismissed Roberts's claims regarding the censorship of the classroom library and the prohibition of his personal, silent reading of the Bible. *Id.* The district court also rejected Roberts's challenge to the principal's order requiring him to conceal the Bible in his desk during school hours. *Id.*

The district court ruled that the censorious actions of the school district did not violate the Establishment Clause. *Id.* at 1514-16. (App. 49a-52a.) Applying the first two "prongs" of the three-part *Lemon* test,[6] the district court held that the censorship had a secular purpose and a permissible primary effect. The court held that school district's "purpose in the removal of the books [from Roberts's classroom library] was to promote religious neutrality according to the mandates of the Establishment Clause." *Id.* at 1515. (App. 50a.) The purpose of requiring Roberts to conceal the Bible in his desk, meanwhile, was to "insulat[e] the students from undue exposure to Roberts' religious beliefs." *Id.* (App. 51a.) The court further ruled that the "primary effect" of the censorship actions "was neither to advance nor inhibit religion," *id.*, but rather was "to insulate students from

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[5] Respondents did not appeal from this ruling, and the issue is not before this Court.

[6] Under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), government action must have a "secular purpose," *id.* at 612, must have a "principal or primary effect" that "neither advances nor inhibits religion," *id.*, and must not foster "excessive government entanglement with religion," *id.* at 613. Petitioner Roberts had not argued that the actions of the school officials violated the "entanglement" prong of the *Lemon* test. Hence, the court did not address this question.

undue exposure to Roberts' religion," *id.* at 1516. (App. 52a.)

The district court went on to hold that it was Ken Roberts, and not the school officials, who had violated the Establishment Clause. Declaring that there was "nothing [in the record] to suggest that Roberts had a non-religious purpose in placing the [contested] books in the classroom library, or in reading the Bible during classroom hours," the court "conclude[d] that there was an improper religious purpose behind Roberts' use of the Bible and the presence of the religious books in his classroom library." *Id.* at 1515. (App. 51a.)

The district court acknowledged that a public school could, consistent with the Establishment Clause, maintain a Bible in the *school* library. *Id.* at 1512-13 (App. 45a-46a.) "In this age of enlightenment, it is inconceivable that the Bible should be excluded from a school library." *Id.* at 1513. (App. 45a.) The court also held that "[t]he Establishment Clause does not require that religious books be removed from the shelves of *school* libraries." *Id.* (App. 46a) (emphasis added) (citing *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963)).[7]

The district court reached the opposite conclusion, however, regarding the two books censored from Roberts's *classroom* library. 702 F. Supp. at 1513-14. (App. 46a-48a.) The court relied upon three asserted distinctions. *Id.* First, said the court, neither *The Bible in Pictures* nor *The Story of Jesus* was a "major historical and literary work" or "source of reference" like the Bible. *Id.* at 1513. (App. 46a.) Second, the court said, the school library collection was segregated according to subject matter and contained books on various religions, while

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[7] On the basis of these holdings, the court ordered the principal and the school district to replace the missing Bible in the school library. 702 F. Supp. at 1509, 1519. (App. 37a, 60a.)

the classroom library had no arrangement by subject and supposedly contained only two "religiously oriented" books.[8] *Id.* at 1513. (App. 47a.) Third, classroom attendance was compulsory and subject to close supervision by teacher and by peers, while students in the school library could select books at will and in privacy. *Id.* at 1513-14. (App. 47a.)

Regarding Roberts's personal Bible reading, the district court was "not persuaded that a teacher's discre[et], inconspicuous, and silent reading of the Bible in the classroom would necessarily expose students to undue religious influence," *id.* at 1516 (App. 53a); consequently, "Roberts' silent reading of the Bible thus presents a closer question and more difficult balance of First Amendment rights," *id.* The court nevertheless upheld the principal's decision to forbid Roberts's silent, personal Bible reading, holding that school officials have the authority to decide for themselves "whether a teacher's use of the Bible . . . constitutes undue religious influence." *Id.* at 1517. (App. 55a.) In response to Roberts's objection that the school officials discriminatorily permitted him to teach about American Indian religion, the district court held that such teaching was "teaching *about* religion," while Roberts's silent, personal Bible reading, and the presence of *The Story of Jesus* and *The Bible in Pictures* in the classroom library, was "teaching religion," *id.* (App. 55a-56a) (emphasis in original). The court declared that "exposure to the tenets of a little known religion, such as those followed in American Indian culture, is far less influential on young students than exposure to a modern

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[8] In light of the undisputed fact that the classroom library contained a book on mythology and two books describing Indian religion, Tr. 51, 64, the district court finding on this point must be regarded as clearly erroneous. *Compare* 921 F.2d at 1055 (App. 15a) (court of appeals opinion noting "the presence of books dealing with Greek gods and goddesses and American Indian religions" in the classroom library).

day, widely observed religion which is a recognizable part of our society." *Id.* (App. 56a.)

Addressing Ken Roberts's asserted rights to free speech and academic freedom, the district court acknowledged that it is "beyond question that teachers are entitled to First Amendment freedoms in the public schools." *Id.* at 1518 (App. 56a) (citing *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969)). The court held, however, that "the right of students and their parents to be free of religious influence in the classroom outweighs Roberts' right to free speech/academic freedom." 702 F. Supp. at 1518. (App. 58a.)

A divided court of appeals affirmed. *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990). (App. 1a.) While acknowledging that it is "neither wise nor necessary to require school officials to sterilize their classrooms and libraries of any materials with religious references," *id.* at 1055 (App. 16a), the court of appeals nevertheless found no Establishment Clause violation in the actions of the school officials, *id.* at 1054-56. (App. 14a-17a.) In particular, the court held that the school officials acted with the legitimate secular purpose of *avoiding* a violation of the Establishment Clause, *id.* at 1054 (App. 14a), and that the "primary effect" of the school officials' actions was "not to disapprove of Christianity," but to "disapprov[e] of the *teaching* of Christianity in the public schools," *id.* at 1055 (App. 16a-17a) (emphasis added).

Regarding Roberts's assertion of a right to free speech and academic freedom, the court of appeals held that "Mr. Roberts' right of expression" had to yield to "the need of public school officials to censor classroom materials for the sole purpose of eliminating a possible constitutional violation." *Id.* at 1056. (App. 18a.) The court ruled that there was an "improper religious purpose behind Mr. Roberts' use of the Bible and the presence of the religious books in his classroom library," and that Roberts's actions "had the primary effect of communicating a message of

endorsement of a religion" to his students. *Id.* at 1057. (App. 20a.)

Senior Circuit Judge Barrett, dissenting, argued that the respondents' censorious actions "were acts of intolerance, lack of accommodation and hostility toward the Christian religion." *Id.* at 1059 (App. 25a) (footnote omitted). Pointing out that Roberts's actions were "passive and *de minimis*," *id.* at 1061 (App. 28a), and that there was no evidence of proselytization or indoctrination in Roberts's class, *id.* at 1060, 1063 (App. 27a, 32a-33a), Judge Barrett found "no basis" other than "speculation" to find any constitutional violation on Roberts's part, *id.* at 1060. (App. 27a.) Judge Barrett observed that the respondent principal took her censorship actions pursuant to an "absolute" view on "separation of church and state," *id.* (App. 26a), a view that "insisted on the *obliteration* of all Christian books from the school premises," *id.* at 1063 (App. 32a) (emphasis in original). This "extreme stance" would convert the "effect" prong of the *Lemon* test "into governmental disapproval, disparagement and hostility toward the Christian religion." *Id.* (App. 32a.)[9]

Applying the *Tinker* test, Judge Barrett found "not a scintilla of evidence . . . that any of Mr. Roberts' practices materially and substantially interfered with the appropriate operation of the school." 921 F.2d at 1061. (App. 30a.) Judge Barrett therefore voted to reverse the judgment of the district court. *Id.* at 1064. (App. 35a.)

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[9] Judge Barrett pointed out that the Free Exercise Clause itself "would necessarily fall" under such a strict application of the first two prongs of the *Lemon* test. *Id.* at 1063-64. (App. 34a.)

REASONS FOR GRANTING THE WRIT

I. THIS CASE RAISES THE IMPORTANT AND UNSETTLED QUESTION WHETHER THE ESTABLISHMENT CLAUSE REQUIRES AFFIRMATIVE CENSORSHIP OF OPTIONAL READING MATERIAL IN A PUBLIC SCHOOL CLASSROOM LIBRARY.

Respondent Madigan, the school principal, ordered petitioner Roberts, a fifth grade teacher, to remove *The Bible in Pictures* and *The Story of Jesus* from a collection of some 240 books maintained in Roberts's classroom library. Madigan based this order on her understanding that the Establishment Clause required the censorship of these materials from the classroom. The court of appeals upheld her action on the same basis.

This Court has never held, however, that the Establishment Clause requires the affirmative censorship of classroom library materials that are available for voluntary, personal selection and private reading by students. This Court should grant the present petition for certiorari in order to review this significant extension, by the court of appeals, of the scope of the Establishment Clause.

This Court has repeatedly affirmed that the Bible and religion are appropriate subjects for study in a public school setting:

> It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said . . . indicates that such study of the Bible or religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.

School Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 (1963). *Accord Epperson v. Arkansas*, 393 U.S. 97, 106 (1968); *Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam) ("the Bible may constitutionally be used

in an appropriate study of history, civilization, ethics, comparative religion, or the like") (citation omitted).

Indeed, a study of religion and religious themes is *essential* to a well-rounded education. As Justice Jackson observed,

> I think it remains to be demonstrated whether it is possible, even if desirable, . . . completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction. . . . [For example,] it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. . . . I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples. *One can hardly respect the system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.*

McCollum v. Board of Education, 333 U.S. 203, 235-36 (1948) (concurring opinion) (emphasis added). *See also Abington*, 374 U.S. at 300 (Brennan, J., concurring) ("it would be impossible to teach meaningfully many subjects in the social sciences or the humanities without some mention of religion"); *Edwards v. Aguillard*, 482 U.S. 578, 607-08 (1987) (Powell, J., joined by O'Connor, J., concurring) ("a familiarity with the nature of religious beliefs is necessary to understand many historical as well as contemporary events. . . . [T]he Establishment Clause does not prohibit per se the educational use of

religious documents in public school education") (footnote omitted). *Cf. Board of Educ. v. Pico*, 457 U.S. 853, 868 (1982) (plurality) ("access to ideas . . . prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members").

All that Ken Roberts did in the present case was to make this "necessary" and "worthy" information available, in a classroom library, for optional, personal reading by the students. As Justice Jackson suggested in *McCollum*, one could hardly respect an educational system that did *not* make such material available to students. *See* 333 U.S. at 235-36 (concurring opinion).

The facts of the present case illustrate the absurdity of any claim of a constitutional need to censor *The Story of Jesus* and *The Bible in Pictures* out of a multi-volume classroom library. Students in Ken Roberts's class could choose from three sources in selecting books for the silent reading period: their own home, the school library, and the classroom library. Obviously, a book brought from home could be a prayer book, a catechism, or a Bible, including a "children's Bible." The selection available in the school library also contained, in addition to numerous secular volumes, over two dozen religious books, including a Bible, Tr. 80, and also including a children's Bible, Tr. 84, 131. The collection of some 240 books in Ken Roberts's classroom library likewise included, in addition to numerous secular volumes, several religious books, including *The Story of Jesus* and a children's Bible, *The Bible in Pictures*. All of these books were available for student use on a purely voluntary, personal basis.

The Establishment Clause certainly does not require public school officials to treat religious books like contraband when they are brought from the home, whether for personal reading by the student or for lending out to other students. Nor, as the district court correctly observed, is it unconstitutional to have religious books in

the school library available for student use. 702 F. Supp. at 1512-13. (App. 45a-46a.) How, then, could the Establishment Clause require the censorship of a comparable multi-volume collection in a classroom library, particularly when that collection represents only a small portion of the thousands of books (whether secular or religious) available for student selection?

As Judge Barrett noted in dissent in the court of appeals, this is not a case in which the teacher has urged or even suggested that students select certain religious books to read. 921 F.2d at 1063 (App. 32a-33a.) Such teacher involvement would be constitutionally problematic regardless of whether the chosen volume came from the nome, the school library, or the classroom library. In the present case, by contrast, the censorship of the books *The Story of Jesus* and *The Bible in Pictures* can only be defended by asserting an absolute constitutional bar to the presence of these books in the classroom. The Establishment Clause imposes no such command.

This Court "consistently has declined to take a rigid, absolutist view of the Establishment Clause." *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984). As in *Lynch*, the "focus of our inquiry" must be on the presence of the challenged books in the relevant "context," *id.* at 679—here, hundreds of volumes available for voluntary student selection in a classroom library, with additional thousands of alternative books available in the school library, and still more books available from each student's home.

The court of appeals therefore erred by singling out for scrutiny the two books *The Bible in Pictures* and *The Life of Jesus*. "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch*, 465 U.S. at 680.

The question presented in the case at bar is whether a public school is required to preclude, in advance, the vol-

untary, personal selection by students of the books *The Story of Jesus* and *The Bible in Pictures*, by removing these volumes from a classroom library collection. The court of appeals held such censorship to be constitutionally mandatory. This Court should grant review to address this highly questionable reading of the Establishment Clause.

II. THIS CASE RAISES THE IMPORTANT AND UNSETTLED QUESTION WHETHER THE ESTABLISHMENT CLAUSE REQUIRES AFFIRMATIVE CENSORSHIP OF THE PERSONAL READING MATERIALS OF A PUBLIC SCHOOL TEACHER.

Respondent Madigan, the school principal, ordered teacher Ken Roberts to conceal in his desk a Bible from which Roberts sometimes read during breaks and during a silent reading period in class. Madigan claimed that the Establishment Clause required censorship of this book, and the court of appeals agreed.

This Court has held that the Establishment Clause prevents a public school teacher from reciting Bible passages aloud for purposes of devotion or indoctrination. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963). The Court has never held, however, that a public school teacher's silent, discreet, personal reading of the Bible during a silent reading period in the classroom violates the Constitution. Nor has the Court ever suggested that the mere unobtrusive presence of a Bible on a public school teacher's desk offends constitutional norms. This Court should grant the present petition for certiorari to review the drastic extension, by the court of appeals, of the prohibitory reach of the Establishment Clause.

Implicit in the decisions of this Court is a consistent recognition that a public school teacher who studies the Bible, or who discreetly and silently reads the Bible to himself, does not *ipso facto* violate the Establishment

Clause. "It certainly may be said that the Bible is worthy of study for its literary and historic qualities." *Abington*, 374 U.S. at 225. If a teacher may constitutionally use the Bible in a course of public school instruction, as this Court has repeatedly affirmed, *see Epperson v. Arkansas*, 383 U.S. 97, 106 (1968); *Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam); *McCollum v. Board of Educ.*, 333 U.S. 203, 235-36 (1948) (Jackson, J., concurring); *Edwards v. Aguillard*, 482 U.S. 578, 606-08 (1987) (Powell, J., joined by O'Connor, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984); and if, moreover, a familiarity with the Bible is an essential component of cultural literacy, *see supra* pp. 14-15 (citing cases); and if, finally, the Bible may be made available for voluntary *student* use, *see* 702 F. Supp. at 1513 (App. 45a) ("it is inconceivable that the Bible should be excluded from a school library"); then, it is simply inconceivable that a teacher should be absolutely forbidden to study or to peruse this fundamentally important work.

In the present case, Ken Roberts did not read aloud from the Bible. He only read it silently to himself, and in a discreet fashion. The book he read was not identifiable to students seated in his classroom, Tr. 151-52, and the Bible was only one of various books and papers cluttering his desk, Tr. 32, 34, 66. "Given the types of subjects youthful minds are primarily concerned with," *Wallace v. Jaffree*, 472 U.S. 38, 66 n.9 (1985) (Powell, J., concurring) (student use of moment of silence), it is very unlikely that the religious or nonreligious content of Roberts's reading would be a major point of interest for his students. "There are too many other subjects on the mind of the typical child." *Id.*[10]

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[10] There is also no evidence that Roberts read from the Bible for personal religious purposes. The record does not even reveal the religious beliefs, if any, of petitioner Roberts. Whether Roberts studied the Bible for the good of his mind, the good of his soul, or both, is, however, simply irrelevant. Indeed, to scrutinize the subjective intentions of a teacher in a search for religious motivations

The holding of the court of appeals in this case, therefore, amounts to a *per se* rule forbidding any public school teacher from silently studying the Bible—and also, presumably, the Koran, the Torah, the Book of Mormon, the life of Buddha, and so forth—in a public school classroom. Such an extreme holding is completely at odds not only with common sense but with the repeated admonitions of this Court that religious materials can be and are fit subjects of academic pursuit.

Under the circumstances of this case, the principal's order banishing the Bible from Roberts's desk top amounted to "a stilted overreaction contrary to our history and our holdings." *Lynch*, 465 U.S. at 686. The principal imposed an absolute rule against the mere presence of the Bible in a public school classroom, and the court of appeals endorsed this *per se* rule by holding that the Establishment Clause compelled this censorship. This Court should grant review to address the question whether the Establishment Clause forbids the mere presence of the Bible on the desk of, or the silent, discreet reading of the Bible by, a public school teacher.

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would represent a blatant invasion of "the inviolable citadel of the individual heart and mind," *Abington*, 374 U.S. at 226, and a clear example of excessive government entanglement with religious matters, *cf. Board of Educ. of Westside Community Schools v. Mergens*, 110 L.Ed.2d 191, 217-18 (1990) (plurality) (discriminatory exclusion of religious speech "might well create greater entanglement problems in the form of invasive monitoring" of the content of speech). Indeed, it would be bizarre to hold that the Bible may be studied only by those teachers who do not attach religious significance to that book.

III. THIS CASE RAISES THE IMPORTANT AND UNSETTLED QUESTIONS WHETHER, AND TO WHAT EXTENT, THE DECISION IN *TINKER v. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT* APPLIES TO PUBLIC SCHOOL TEACHERS.

"First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers . . . ." *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969). As this Court declared in *Epperson v. Arkansas*, "It is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees." 393 U.S. 97, 107 (1968) (citation omitted). The present case involves the application of these basic principles in two contexts: the academic freedom of a teacher to select books for a classroom library, and the right of a teacher personally to select materials for his own silent, discreet reading during breaks and quiet reading periods.[11]

The books Roberts collected in his classroom library were simply materials made available for optional, personal, and voluntary selection by students. So long as the contents of books are not harmful to students—as would be the case, for example, with inappropriate sexual education materials or matters otherwise destructive of student morals—the teacher retains the academic freedom to maintain a collection of supplemental reading materials free from attempts to censor out books deemed "unwelcome" because of religious content. "Any attempt to impose rigid limits upon the mention of God or references to the Bible in the classroom would be fraught with

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[11] *Tinker* involved public expression in the form of a symbolic black armband. The present case, by contrast, did not involve an effort by Roberts to make a public statement. Hence, Roberts's actions triggered no countervailing concerns about potential disruption of the academic environment.

dangers." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 301 (1968) (Brennan, J., concurring).

Telling Ken Roberts that he could, while in the classroom, read and keep on his desk top any book except the Bible, moreover, clearly represented content-based discrimination against religious speech. This Court condemned precisely such content-based discrimination in *Widmar v. Vincent*, 454 U.S. 263, 276 (1981), in which college officials sought to deny equal access to religious student groups. The Court held that the college's asserted interest "in achieving greater separation of church and State" was not sufficiently "compelling" to justify content-based discrimination against religious speech. *Id.* And in *Tinker*, this Court held that, absent a need to avoid disruption of the school environment, the "prohibition of expression of one particular opinion" in a public school setting "is not constitutionally permissible." 393 U.S. at 511. In the present case, the official discrimination was especially obnoxious because it forbade the mere silent, unobtrusive reading of a particular book on the basis of its religious content. While the Establishment Clause may justify restrictions on proselytization or ostentatious religious displays by public school teachers, the suppression of personal religious reading material constitutes a flagrant transgression of the freedom of thought and conscience protected under the first amendment.[12]

The district court and the court of appeals each recognized that Roberts had asserted important rights se-

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[12] Petitioner makes no claim of a right to read the Bible or any other book when he is legitimately required to be engaged in other pedagogical activities. But when a teacher is otherwise allowed to leave books on his desk and discreetly read from them during breaks or silent reading periods, the school administration may not constitutionally censor out specific books purely because of their religious content.

cured under the first and fourteenth amendments. Each court concluded, however, that the right of students to be free from improper religious influence extended so far as to apply to, and outweigh, Roberts's academic freedom and liberty to pursue personal reading choices. This Court should grant review to address this serious undervaluation of the first amendment rights of public school teachers.

IV. THIS CASE RAISES THE IMPORTANT AND UNSETTLED QUESTION WHETHER EXCESSIVE AND UNJUSTIFIABLE EFFORTS TO ELIMINATE RELIGIOUS MATERIALS FROM THE PUBLIC SCHOOL VIOLATE THE NEUTRALITY REQUIREMENT OF THE ESTABLISHMENT CLAUSE.

The respondent principal in the present case undertook zealously to eliminate all mention of God or references to the Bible in the classroom. This Court has repeatedly counseled, however, that the Establishment Clause requires *neutrality*, not *hostility*, toward religion. The present case therefore raises the important question whether such "separationist zeal" violates the neutrality requirement of the Establishment Clause.

The *Lemon* test provides that government action violates the Establishment Clause if "the principal or primary effect" of that action "inhibits religion." *Lemon v. Kurtzman*, 403 U.S. at 602, 612 (1971) (citation omitted). Elaborating upon this constitutional requirement, the Court has explained that the Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch*, 465 U.S. at 673 (and cases cited); *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) ("the government must pursue a course of complete neutrality toward religion") (and cases cited). As Justice Brennan wrote in *McDaniel v. Paty*, 435 U.S. 618 (1978), "The Estab-

lishment Clause, properly understood, is a shield against any attempt by government to inhibit religion," *id.* at 641 (Brennan, J., concurring in judgment). "It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life." *Id.* (footnote omitted).

In the present case, respondents have indulged an exaggerated interpretation of the Establishment Clause and, in the process, crossed the line into unconstitutional disparagement of religion.[13]

The principal ordered Roberts to remove, from a classroom library of some 240 books, the only two volumes that provided interested students a familiarity with "the world's all-time best seller"—the Bible. *Edwards v. Aguillard*, 482 U.S. 578, 608 (1987) (Powell, J., joined by O'Connor, J., concurring) (internal quotations marks and footnote omitted). She also ordered Roberts to conceal the Bible in his desk, thereby exhibiting an unwarranted opposition to the mere passive presence of "the Book," despite its "undoubted literary and historic value," *id.* Going still further, the principal ordered Roberts to take down a poster depicting a nature scene, simply because the caption of the poster generically referred to "the hand of God."

The Establishment Clause, however, does not "impose rigid limits upon"—much less forbid absolutely—"the mention of God or references to the Bible in the classroom," *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 301 (1963) (Brennan, J., concurring). As Chief Justice (then-Associate Justice) Rehnquist wrote

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[13] Under the test formulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), government actors need not be *subjectively* hostile toward religion in order to violate the Establishment Clause. All that is necessary for a constitutional violation is *objective* disparagement of religion—i.e., that the government action have a "principal or primary effect" that "inhibits religion," *id.* at 612.

in dissent in *Stone v. Graham*, 449 U.S. 39, 45-46 (1980). "The Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin."

Justice Goldberg warned of precisely such overzealous separationism in his concurring opinion in the *Abington* case:

> It is said, and I agree, that the attitude of government toward religion must be one of neutrality. But *untutored devotion to the concept of neutrality can lead* to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of *a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution but, it seems to me, are prohibited by it.*

374 U.S. at 306 (Goldberg, J., concurring) (emphasis added).

As Judge Barrett wrote in dissent in the court below, the censorship actions of respondents "were acts of intolerance, lack of accommodation and hostility toward the Christian religion." 921 F.2d at 1059 (App. 25a) (footnote omitted). This Court should grant review to answer the question whether such "hostility to the religious" violates the neutrality requirement of the Establishment Clause.

CONCLUSION

For all of the foregoing reasons, therefore, this Court should grant the petition for certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in the case at bar.

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March 15, 1991

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 89-1014

KENNETH ROBERTS, MARC NELSON, and ZAY NELSON, Parents and Next Friends of Kelly Nelson and Amy Nelson, and DEBRA J. WHITE, Parent and Next Friend of Kelly White,

Plaintiffs-Appellants,

v.

KATHLEEN MADIGAN and ADAMS COUNTY SCHOOL DISTRICT NO. 50,

Defendants-Appellees,

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO, INC., and AMERICAN JEWISH CONGRESS,

Amici Curiae.

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 88-F-1908)

[Filed Dec. 17, 1990]

Jordan W. Lorence of Concerned Women for America Legal Foundation, Washington, D.C. (Cimron Campbell and Mark N. Troobnick of Concerned Women for America Legal Foundation, Washington, D.C.; Wendell R. Bird, Atlanta, Georgia; and Roger Westlund, Thornton, Colorado, with him on the briefs), for Plaintiffs-Appellants.

Martin Semple (Franklin A. Nachman with him on the brief), Semple & Jackson, P.C., Denver, Colorado, for Defendants-Appellees.

(Phillip S. Figa and Candace C. Figa of Burns & Figa, P.C., Denver, Colorado; Bradley A. Levin of Breit, Best, Richman & Bosch, P.C., Denver, Colorado, Attorneys for Amicus Curiae; and Jeffrey P. Sinensky, Steven M. Freeman, Richard E. Shevitz, and Meyer Eisenberg of Anti-Defamation League of B'nai B'rith, New York, New York; and Professor Ruti Teitel, New York Law School, New York, New York, Of Counsel, on the brief for Amicus Curiae Anti-Defamation League of B'Nai B'rith.)

(John Preston Baker of Coghill & Goodspeed P.C., Denver, Colorado; Robert W. Thompson, Jr., Denver, Colorado; and David Miller, Legal Director, American Civil Liberties Union of Colorado, Denver, Colorado, on the brief for Amicus Curiae American Civil Liberties Union of Colorado.)

(Marc D. Stern, Lois C. Waldman, Amy Adelson, and Jeremy S. Garber, American Jewish Congress, New York, New York, on the brief for Amicus Curiae American Jewish Congress.)

Before McKAY and BARRETT, Circuit Judges, and O'CONNOR,[1] Chief District Judge.

McKAY, Circuit Judge.

This is an appeal from a judgment by the district court denying plaintiffs' claims for damages and all but

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[1] Honorable Earl E. O'Connor, Chief United States District Judge for the District of Kansas, sitting by designation.

one claim for injunctive relief against defendants Kathleen Madigan and the Adams County School District No. 50.

I. Facts

Plaintiff Kenneth Roberts is a fifth-grade school teacher at the Berkeley Gardens Elementary School in Denver, which is part of the Adams County School District No. 50. Kelly Nelson, Amy Nelson, and Kelly White are or were students at Berkeley Gardens Elementary. Plaintiffs Marc and Zay Nelson are the parents of plaintiffs Kelly and Amy Nelson. Plaintiff Debra Jean White is the parent of plaintiff Kelly White. None of the plaintiff students were enrolled in Mr. Roberts' class at the time this suit was filed, although Kelly Nelson was previously in Mr. Roberts' class. Defendant Kathleen Madigan is the principal at Berkeley Gardens.

As part of his classroom curriculum, Mr. Roberts spent a significant amount of time teaching reading skills to his fifth graders. One method he used to teach the value of reading was to devote fifteen minutes each day to a "silent reading period." During this silent reading period, students were allowed to choose their own reading materials; they could have been brought from the students' homes, chosen from the school library, or selected from Mr. Roberts' classroom library. The classroom library was a collection of about 239 books of varying content that Mr. Roberts had compiled over his nineteen years of teaching. In order to set an example for the students, Mr. Roberts silently read his own materials during the silent reading time.

Frequently, the book Mr. Roberts chose to read silently was the Bible, which he kept on his desk throughout the school day. Mr. Roberts never read from the Bible aloud nor overtly proselytized about his faith to his students. Mr. Roberts also displayed a poster in his classroom that read, "You have only to open your eyes to see the hand

of God." The trial court found that, in context, Mr. Roberts' Bible reading, the poster, and the presence of two Christian books in Mr. Roberts' classroom library created the appearance that Mr. Roberts was seeking to advance his religious views.

The events leading to this litigation took place during the 1987-88 school year. On September 10, 1987, a parent/teacher open house was held, at which time a parent complained to Principal Madigan about the presence of two Christian religious books on the shelves of Mr. Roberts' classroom library. The two books are titled *The Bible in Pictures* and *The Life of Jesus*.[2] That same evening, Ms. Madigan entered Mr. Roberts' classroom, perused the two books, and directed Mr. Roberts to remove them from the classroom library. Ms. Madigan did not ask Mr. Roberts how the books were being used before she ordered their removal. She explained to Mr. Roberts that "separation of church and state" required that the books be removed. Ms. Madigan also noticed the Bible that Mr. Roberts kept on his desk and requested that he keep it out of sight during classroom hours. Mr. Roberts immediately complied with the directive.

Ms. Madigan testified that she had spoken to Mr. Roberts on two previous occasions concerning the Bible on his desk. In September of 1986, Ms. Madigan made a routine visit to Mr. Roberts' classroom and observed him reading his Bible silently. Ms. Madigan told him

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[2] *The Bible in Pictures* is a 320-page volume with over one thousand illustrations. The illustrations are designed to provide both children and adults with a better understanding of the Bible. In the book's preface, the author states: "I pray that this book may bring a fresh vision of Christ, and God's purpose in Him, to you who now read it in the midst of the heartache and frustration of our modern world."

The Story of Jesus is a 128-page volume that depicts through illustrations and text the birth, life, and resurrection of Jesus Christ. The book concentrates on the teachings of Jesus of Nazareth with the underlying premise that he is the Son of God.

at that time that she expected him to keep the Bible off his desk between 8:00 a.m. and 3:30 p.m. Later, in November 1986, Ms. Madigan again visited Mr. Roberts' classroom and found him reading his Bible. She repeated her earlier admonition that he should keep his Bible in his desk during school hours.

On September 14, 1987, a few days after Ms. Madigan ordered Mr. Roberts to remove the two books from his classroom, Mr. Roberts discussed the matter with Principal Madigan. Mr. Roberts questioned the propriety of Ms. Madigan's directive and asked her for any written school district guidelines or policies that he had violated or that would enlighten him as to what types of materials he could keep in his classroom. Ms. Madigan denied his request and simply stated that common sense and her previous remarks were sufficient.

On September 18, 1987, Mr. Roberts gave Ms. Madigan a written memorandum asking her to reconsider her directive. In the memorandum, Mr. Roberts again asked Ms. Madigan for any written guidelines the school district had pertaining to censorship of books and placement of items on teachers' desks. Ms. Madigan discussed the matter with various school officials but did not change her position. On September 24, 1987, Mr. Roberts met with Principal Madigan, Michael Bassett, the head of personnel for the school district, and Anita Ratliff, the other fifth-grade teacher at Berkeley Gardens Elementary. At the meeting, Ms. Madigan and Mr. Bassett gave Mr. Roberts a written directive reaffirming Ms. Madigan's earlier instructions stating: "The law is clear that religion may not be taught in a public school. To avoid the appearance of teaching religion, I have given you this directive. Failure to comply with this directive will be considered insubordination and could result in disciplinary action." Record, vol. 1, doc. 1, at 14. Mr. Roberts later appealed to the district superintendent, Mr. Masarotti, but Mr. Masarotti did not override the directive handed down by Ms. Madigan.

In addition to the action taken in Mr. Roberts' classroom, plaintiffs alleged that sometime in September 1987, Ms. Madigan visited the school library at Berkeley Gardens Elementary and removed a Bible from the library shelves. Defendants contended the Bible was not removed by Ms. Madigan. They stipulated at trial, however, that the Bible would be replaced and not removed again.

Mr. Roberts, along with the plaintiff students and their parents, brought this action seeking damages and injunctive relief against Ms. Madigan and the school district. Plaintiffs based their claim on the theory that the school district, by ordering the two books off Mr. Roberts' shelf, by directing him to keep his Bible out of sight during school hours, and by removing the Bible from the school library, violated the plaintiffs' first amendment rights of free speech, academic freedom, and access to information. Plaintiffs also asserted that the district's actions violated the Establishment Clause by treating Christianity in a non-neutral, disparaging manner.

After a trial before the district court, the court ordered the school district to return the Bible to the Berkeley Gardens school library. Concerning Ms. Madigan's actions in Mr. Roberts' classroom, however, the court concluded not only that the school district acted properly but that the Establishment Clause required such action. *See Roberts v. Madigan*, 702 F. Supp. 1505, 1514-17 (D. Colo. 1989). Accordingly, the court went on to conclude that the district did not violate the principle of government neutrality toward religion, but that it simply acted appropriately in its effort to prevent Mr. Roberts from teaching religion. *See id.* As for the plaintiffs' free speech claims, the court held that in the balance between Mr. Roberts' rights to freedom of expression and academic freedom on the one hand, and the students' rights to be free from religious indoctrination on the

other, the students' interests must prevail. Consequently, the court rejected Mr. Roberts' free speech arguments and denied the relief he sought. Finally, the Court dismissed the student plaintiffs' claims and the claims of their parents for lack of standing. The court noted that none of the student plaintiffs were in Mr. Roberts' class at the time their suit was filed.

II. Standing of Parents and Students

The district court dismissed the parents' and students' claims for lack of standing. Plaintiffs now argue that the district court erred in its assessment of the students' and parents' standing to assert claims for both injunctive relief and damages.

At the outset, we note that in order to satisfy the Article III "case or controversy" requirement, the students and parents must allege that they have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." *Baker v. Carr*, 369 U.S. 186, 204 (1962). Thus, standing has been held to exist only if the aggrieved party makes a two-fold showing. First, the plaintiffs must show that they have suffered a "distinct and palpable injury." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72 (1978). Second, the plaintiffs must demonstrate a causal link between the claimed injury and the challenged conduct. *Id.* This second prong may be satisfied by showing that there is a substantial likelihood that the relief sought will address the claimed injury. *See id.* at 75 n.20; *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 43 (1975).

In this case, the district court dismissed the parents' and students' claims because none of the students were in Mr. Roberts' class at the time this law suit was filed. We now address separately the standing issues with respect to injunctive relief and damages.

A. *Injunctive Relief*

Plaintiffs argue that the school district's removal of the two books and its order requiring Mr. Roberts to cease his silent Bible reading give the students and parents standing to seek injunctive relief. Plaintiffs claim that because all the students involved are or have been enrolled at Berkeley Gardens, they all have standing to challenge state action that touches Mr. Roberts' classroom. In support of this argument, plaintiffs cite a number of cases in which students and their parents were found to have standing to challenge alleged first amendment violations in the public schools. *See Wallace v. Jaffree*, 472 U.S. 38 (1985) (Alabama statute authorized one-minute period of silence for prayer or meditation each day in all public schools); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) (Pennsylvania law required ten verses of Bible to be read at beginning of each school day in each class); *McCollum v. Board of Educ.*, 333 U.S. 203 (1948) (religious instruction carried out in all classrooms for a certain period each week); *Bell v. Little Axe Indep. School Dist. No. 70*, 766 F.2d 1391 (10th Cir. 1985) (weekly religious meetings held on school premises, supervised by teachers, and advertised on school premises by posters and in school publications). We agree that each case cited by plaintiffs supports the notion that students and their parents may challenge unconstitutional actions in the public schools that *directly* affect the students. The cases cited, however, are distinguishable from the present case because each involved religious activities from the present case because each involved religious activities occurring school wide or within the plaintiffs' own classrooms. Because none of the students involved in this suit were in Mr. Roberts' class at the time this suit was filed, none of the students, and therefore none of their parents, were directly affected by the district's ac-

tions in Mr. Roberts' classroom.[3] We thus conclude that none of the students or parents satisfy the two-prong standing requirement set forth above.

Kelly White and Amy Nelson were both too young to be in Mr. Roberts' class at the time of this suit. There is no more than a speculative likelihood that either of these students will be in his class in the future. Accordingly, we conclude that Kelly White and Amy Nelson fail to satisfy the first prong of the standing requirement because they can demonstrate no "distinct and palpable injury" caused by the district's directive to Mr. Roberts. In this regard, we find persuasive the district court's observation that the students "cannot claim First Amendment violations for the removal of books to which they did not have access, nor for actions against a teacher in whose class they were not enrolled." *Roberts v. Madigan*, 702 F. Supp. 1505, 1519 (D. Colo. 1989).

Kelly Nelson, who was in Mr. Roberts' class at the time of the school district's directive, presents a closer standing question. She nevertheless fails to show standing. Because Kelly Nelson had graduated from Mr. Roberts' class before this suit was filed,[4] she fails to satisfy

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[3] Plaintiffs argue that the students and parents were directly affected by, and thus have standing to challenge, Ms. Madigan's alleged removal of the Bible from the school library. Following the trial, the district court ordered the district to replace the Bible in the library and to refrain from removing it again. Neither party challenges this part of the district court's order. Accordingly, plaintiffs' standing on that issue is not before us on appeal. In addition, standing to challenge the removal of the Bible does not create standing for plaintiffs to challenge the other actions taken by the school district.

[4] The record indicates that Kelly Nelson was enrolled in Mr. Roberts' class during the 1987-88 school year, which ended in June 1988. *See* Record, vol. 2, at 98-100. This suit was not filed, however, until November 22, 1988.

the second of the two standing requirements.[5] Although Kelly Nelson would have had access to the two Christian books were it not for the actions of the school district, she nevertheless lacks standing because injunctive relief cannot redress her injury now that she is no longer in Mr. Roberts' class.

B. *Damages Claims*

Plaintiffs argue that the district court erroneously ignored the existence of their damages claims when it dismissed them for lack of standing. We recognize that standing may exist where a claim for damages is still alive despite mootness or lack of standing for injunctive relief. *Cf. Ellis v. Brotherhood of Ry., Airline & Steamship Clerks, Freight Handlers, Express & Station Employees*, 466 U.S. 435, 441-43 (1984); *Powell v. McCormack*, 395 U.S. 486, 495-500 (1969); *Bell v. Little Axe Indep. School Dist. No. 70*, 766 F.2d 1391, 1398-99 (10th Cir. 1985). Because the students and parents sought damages as well as injunctive relief, Kelly Nelson would appear to have standing to challenge the district's actions in Mr. Roberts' classroom. We note, however, that plaintiffs failed to preserve their damages claims at the trial level.

The district court, pursuant to plaintiffs' motion for preliminary injunction, held a consolidated hearing for both preliminary and permanent injunction. At the close of those proceedings, the court requested post-hearing briefs on a number of issues. *See* Record, vol. 2, at 198-200. Included among those issues was the issue of the students' and parents' standing. After considering the evidence adduced at the hearing and the briefs submitted, the district court dismissed *all* the students' and parents' claims for lack of standing.

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[5] We acknowledge that Kelly Nelson's claim for damages would satisfy the "causal link" requirement. It is necessary to note, therefore, that our conclusion here applies only to Kelly Nelson's standing to seek injunctive relief.

We have examined the post-hearing briefs submitted to the district court. There is no discussion in the plaintiffs' brief concerning their damages claims and how the existence of those claims affected standing. In order to review an issue on appeal, we require the specific issue to be raised before the district court. "It is well established in this circuit that 'a party may not sit idly by, watching error being committed, and then raise the claimed error on appeal without having accorded the trial court the opportunity to correct its action.'" *Chevron, U.S.A., Inc. v. Hand*, 763 F.2d 1184, 1186 (10th Cir. 1985) quoting *Gundy v. United States*, 728 F.2d 484, 488 (10th Cir. 1984)). In *Gundy* we stated that "failure to raise the issue with the trial court precludes any review except for the most manifest error." *Gundy*, 728 F.2d at 488. *See also Burak v. General American Life Ins. Co.*, 836 F.2d 1287, 1291 (10th Cir. 1988); *United States v. Troutman*, 814 F.2d 1428, 1444 (10th Cir. 1987); *United States v. Diaz-Albertini*, 772 F.2d 654, 657 (10th Cir. 1985). Plaintiffs did not raise the issue of standing based on their damages claims at the hearing or in their post-hearing briefs. Moreover, when the district court dismissed all the parents' and students' claims, plaintiffs made no post-judgment motion suggesting that their damages claims preserved the parents' and students' standing. Accordingly, the students' and parents' damages claims cannot now form the basis for urging standing. We do not find the district court's finding that plaintiffs lacked standing on this issue to be manifest error.

For the reasons set forth above, we hold that the district court properly dismissed the students' and parents' claims for lack of standing. Nevertheless, we address the merits of Mr. Roberts' claims, which are largely equivalent to the claims asserted by the students and parents.

III. Establishment Clause

Mr. Roberts claims that the school district violated the Establishment Clause by: (1) removing *The Bible in Pictures* and *The Story of Jesus* from the classroom library, (2) ordering Mr. Roberts not to read his Bible in the classroom during school hours, (3) ordering Mr. Roberts to keep his Bible off his desk during school hours, and (4) removing the Bible from the school library.[6] The district court examined each of the challenged actions and concluded that, with the exception of the Bible in the school library, the school district had not violated the Establishment Clause.

The proper relationship between religion and the state under the Establishment Clause[7] is difficult to determine. Clearly, religion is a pervasive force in our society. "This is not to say, however, that religion has been so identified with our history and government that religious freedom is not likewise as strongly imbedded in our public and private life." *School District of Abington Township v. Schempp*, 374 U.S. 203, 214 (1963). Here, we face the difficulty of determining the proper balance between the freedom from religious coercion created by state-sponsored religion and the inescapable reality that our culture is permeated by religious symbols and rituals. Nowhere has the proper line of demarcation been more difficult to define than in our nation's public schools.

Over the years, the Supreme Court has developed a three-part test for determining the propriety of state

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[6] We note that, contrary to the argument of defendants, the Bible in the school library was an issue in this case. The parties agreed at the hearing that the Bible should be in the library. However, the issue was not removed from the case until defendants stipulated to remedial steps. This explains the trial court's injunction requiring defendants to replace the Bible and not remove it in the future. Thus, the Bible was in issue, and plaintiffs prevailed on that part of the case.

[7] Under the first amendment, "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I.

action under the Establishment Clause as it applies to the states through the fourteenth amendment.[8] First, state action must have a secular purpose. Second, the primary effect of any state action must be one that neither advances nor inhibits religion. Finally, state action must not foster excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The first two criteria thus require that governmental action be neutral with respect to religion, both in purpose and primary effect. This requirement of government neutrality prohibits governmental action whose purpose or effect is to suppress religion as well as action that advances it. *See Wallace v. Jaffree*, 472 U.S. 38, 56, n.42 (1985). Against this background, we now consider the constitutionality of the school district's conduct in the case at bar.

A. *The School District's Purpose*

At trial, Mr. Roberts claimed that the school district acted against him in order to disapprove of Christianity. The district court, however, found that the school district had a secular purpose in taking the challenged actions. Having examined the record, we do not hold the district court's finding clearly erroneous.

The only evidence relating to the school district's motives indicates that the district simply wanted to prevent Mr. Roberts from violating the Establishment Clause. When asked whether Ms. Madigan gave any reason for her directive of September 10, 1987, Mr. Roberts testified that Ms. Madigan told him it was necessary "because of separation of church and state." Record, vol. 2, at 28. Further, when Mr. Roberts asked Ms. Madigan for written guidelines and policies that he had violated, Ms.

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[8] It is well-settled that the first amendment prohibitions on congressional action now apply to state action by virtue of the fourteenth amendment due process clause. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

Madigan responded with a brief written directive. The directive stated her sole purpose as follows: "The law is clear that religion may not be taught in a public school. To avoid the appearance of teaching religion, I have given you this directive." Record, vol. 1, doc. 1, at 14. We find no evidence in the record that suggests a purpose for the district's action other than that stated in the written directive. We therefore affirm the district court's finding that the school district had a secular purpose for its actions, namely, to assure that none of Mr. Roberts' classroom materials or conduct violated the Establishment Clause.[9] The Supreme Court has held that the state is constitutionally required to see that state-supported activity is not used for religious indoctrination. *See Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472, 480 (1973); *Lemon*, 403 U.S. at 619. *See also Breen v. Runkel*, 614 F. Supp. 355, 358 (W.D. Mich. 1985). *Cf. Board of Educ. v. Mergens*, 110 S. Ct. 2356, 2371 (1990); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335-36 (1987); *Gillette v. United States*, 401 U.S. 437, 453 (1971).

B. *Primary Effect*

Mr. Roberts further challenges the school district's actions arguing that regardless of the district's motives, the actual *effect* of Ms. Madigan's directive was a disparagement of Christianity. As we examine the school district's conduct under the "effect" prong of the *Lemon* test, we again point out that public school officials "must

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[9] The appropriate standard of review we should apply to the district court's findings under the *Lemon* test is not clear. *See Friedman v. Board of County Comm'rs of Bernalillo*, 781 F.2d 777, 779 n.2 (10th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). Whether it is appropriate to apply a clearly erroneous standard, *Lynch v. Donnelly*, 465 U.S. 668, 681 (1984), or a *de novo standard*, *id.* at 693-94 (O'Connor, J., concurring), however, is of no consequence here. We would affirm under either standard.

be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion." *Lemon*, 403 U.S. at 619. As Mr. Roberts correctly notes, however, school officials must carry out this duty in a way that neither endorses nor disparages a particular religion or religion in general. Indeed, the Supreme Court has repeatedly stated that the effect prong is not satisfied if official action, regardless of its purpose, "conveys a message of endorsement or disapproval" of religion. *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985); *School District of Grand Rapids v. Ball*, 473 U.S. 373, 389 (1985); *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984).

Mr. Roberts contends that the district, by removing the two Christian books and the Bible from the classroom, necessarily conveyed a message of disapproval toward Christianity. He notes that the school district removed only the two Christian books and disallowed Mr. Roberts' reading of only the Bible in class. At trial, testimony showed that while the school district removed *The Bible in Pictures* and *The Story of Jesus* from the classroom library, the district ignored the presence of books dealing with Greek gods and goddesses and American Indian religions. The evidence also indicates that the school district did not allow Mr. Roberts to read his Bible or keep it on his desk, but nevertheless allowed him to teach activity about Navajo Indian religion. Mr. Roberts was also allowed to read silently a book dealing with the life of Buddha and keep it on his desk for some period.

Because the school district allegedly treated the Christian materials differently than any other materials, Mr. Roberts concludes that the primary effect of the district's action must have been a disparagement of Christianity. Mr. Roberts infers that "[t]he school's actions do not convey a message of obeying the Establishment Clause, because then the school district would have removed all religious books, and prohibited teachers from silently reading any religious book." Brief of Appellants at 23.

Mr. Roberts' argument sweeps much too broadly. Were we to accept his characterization of the school district's actions, any official removal of specific religious materials from public schools would necessarily be considered non-neutral toward religion. The fallacy of this position is exposed when we recognize that all corrective actions taken to assure that individual teachers do not teach religion must be aimed at the specific religions or value systems being taught. The removal of materials from the classroom is acceptable when it is determined that the materials are being used in a manner that violates Establishment Clause guarantees. Thus, the Establishment Clause focuses on the manner of *use* to which materials are put; it does not focus on the content of the materials per se. For example, the books about American Indian religion could be used in violation of the Establishment Clause if they were taught in a proselytizing manner. Because they were not so used, however, those books do not violate the Establishment Clause by the very existence of their content. It is neither wise nor necessary to require school officials to sterilize their classrooms and libraries of any materials with religious references in order to prevent teachers from inculcating specific religious values. Instead, school officials must be allowed, within certain bounds, to exercise discretion in determining what materials or classroom practices are being used appropriately. "[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 507 (1969).

Considering the evidence, we affirm the district court's finding that the primary effect of the school's actions was not to disapprove of Christianity. The mere fact that the actions were aimed exclusively at Christian religious materials does not automatically mean the ac-

tions' primary effect was to send a disapproving mesage regarding Christianity. If we must draw any message from the actions, that message must be that the school district disapproves of the teaching of Christianity in the public schools. Here, we are particularly mindful as was the district court, that there is a "difference between teaching *about* religion, which is acceptable, and teaching religion, which is not." *Roberts v. Madigan*, 702 F. Supp. 1505, 1517 (D. Colo. 1989). Mr. Roberts' avowed purpose for reading his Bible in class was to model reading for the students. Because Mr. Roberts chose to keep his Bible on his desk continuously and read it frequently, Ms. Madigan feared that Mr. Roberts was setting a Christian tone in his classroom. Having formed that impression, Ms. Madigan had a duty to take corrective steps, and to do so in a religiously neutral manner. Ms. Madigan's only stated reasons were that the Christian books and the Bible might violate "separation of church and state" and that "religion may not be taught in a public school." We discern no anti-Christian message here. The school district's conduct thus satisfies the "primary effect" test as well as the "purpose" test under *Lemon*.

None of the parties suggest that the school district's activities involved any excessive entanglement of the state with religion. Accordingly, we hold that the entire *Lemon* test was fulfilled and the school district did not violate the Establishment Clause by issuing the challenged directive.

IV. Free Speech and Academic Freedom

Mr. Roberts claims that the school district violated his first amendment rights of free speech and academic freedom by removing the two Christian books from the classroom and ordering him to stop reading his Bible in class. According to Mr. Roberts, his Bible reading and the presence of the two Christian books were expressive ac-

tivities that were protected from content-based censorship under the first amendment.

Plaintiffs argue that the school district's conduct violated the student plaintiffs' free speech rights by denying the students access to the two books and the opportunity to observe Mr. Roberts reading of his Bible silently in class. We recognize the similarity between the facts of this case and those involved in *Board of Educ. v. Pico*, 457 U.S. 853 (1982). In *Pico*, a plurality of the Supreme Court recognized a free speech "right to receive" information and held unconstitutional a school board's censorship of several books from a school library. *See Pico*, 457 U.S. at 866-67. Because the student plaintiffs lack standing to challenge the removal of the Christion books, however, we express no opinion regarding the impact of the district's directive on the students' asserted rights to receive ideas. Our holding is therefore limited to the issues regarding Mr. Roberts' rights to self-expression and academic freedom in the classroom.

We begin our discussion by noting that "[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969). Nevertheless, the Supreme Court has repeatedly emphasized that the rights of students and teachers in the public schools "are not automatically coextensive with the rights of adults in other settings." *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986); *see Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988). We are thus faced with the tension between Mr. Roberts' right of expression and the need of public school officials to censor classroom materials for the sole purpose of eliminating a possible constitutional violation.

We apply the "substantial interference" or "balancing" standard enunciated in *Tinker* to the competing interests of Mr. Roberts and the school officials. There,

the Court concluded that "students may express their opinions at school, even on controversial subjects, so long as they do so without materially disrupting classwork, creating substantial disorder, or invading the rights of others." [10] *Tinker*, 393 U.S. at 513. We find no reason here to draw a distinction between teachers and students where classroom expression is concerned. Thus, if the speech involved is not fairly considered part of the school curriculum or school-sponsored activities, then it may only be regulated if it would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker*, 393 U.S. at 509. If, on the other hand, the conduct endorses a particular religion and is an activity "that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school," *Kuhlmeier*, 484 U.S. at 271, creating the requisite state action, then the activity infringes on the rights of others and must be prohibited.

We return to the factors set forth in *Lemon*, 403 U.S. at 612-13, then, to determine whether Mr. Roberts' actions violated the Establishment Clause. The district

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[10] In *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), the Supreme Court granted school officials broad discretion when the decision involved "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Id.* at 271. The Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273. The school district here, however, claims that the books were removed to avoid an Establishment Clause violation rather than for educational or pedagogical reasons. Because the school district asserts a constitutional justification, a claim that this body is well-equipped to evaluate, we do not accord it the same deference as in other cases involving issues that school officials are uniquely qualified to handle.

court, after reviewing the testimony and evidence, correctly found that there was an improper religious purpose behind Mr. Roberts' use of the Bible and the presence of the religious books in his classroom library. Upon analyzing Mr. Roberts' actions within the classroom environment at the time the dispute arose, including the poster on the classroom wall requesting readers to open their eyes to see the hand of God, we agree that the evidence sufficiently demonstrated that Mr. Roberts' actions were prompted by a religious purpose. Although Mr. Roberts testified that he was acting as a role model for his students when he read the Bible, his underlying purpose for reading the Bible was, at best, ambiguous. As the district court noted, Mr. Roberts offered nothing to suggest that his actions were non-religious.[11]

We believe that the district court also properly concluded that Mr. Roberts' actions, when viewed in their entirety, had the primary effect of communicating a message of endorsement of a religion to the impressionable ten-, eleven-, and twelve-year-old children in his class.

> "The meaning of a statement to his audience depends both on the intention of the speaker and on the 'objective' meaning of the statement in the community. . . . If the audience is large, as it always is when government 'speaks' by word or deed, some portion of the audience will inevitably receive a message determined by the 'objective' content of the statement, and some portion will inevitably receive the intended message. Examination of both the sub-

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[11] We note the conflict in the record concerning Ms. Madigan's purpose in prohibiting Mr. Roberts from reading the Bible in class. There is some indication that she did not want him reading anything during class so that he could "be actively involved in teaching children." Record at 117. To the extent that this was her purpose, we uphold her decision as "reasonably related to legitimate pedagogical concerns." *Kuhlmeier*, 484 U.S. at 260.

> jective and the objective components of the message communicated by a government action is therefore necessary to determine whether the action carries a forbidden meaning."

Lynch, 465 U.S. at 690 (O'Connor, J., concurring). Here, it is reasonable to conclude that not all of Mr. Roberts' students would receive a purportedly secular message. Mr. Roberts left his personal Bible on his desk in his fifth-grade classroom at all times and read it during class time. Like his Bible, the two other contested books were Mr. Roberts' personal property and were not used as part of the class curriculum. Further, the three books were the only books in the classroom that were demonstrated to contain religious themes, all three pertained to Christianity. Considering these factors in light of the environment of a fifth-grade classroom, the district court properly concluded that the books had the primary effect of advancing religion. *See Edwards v. Aquillard*, 482 U.S. 578, 584 (1987) (noting that elementary schoolchildren "are impressionable and their attendance is involuntary"). When viewed from the eyes of the children in Mr. Roberts' class, the placement of the two books in the class library, the placement of Mr. Roberts' Bible on his desk, and Mr. Roberts' reading of the Bible during the reading period provided "a crucial symbolic link between government and religion." *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 385 (1985).

Under both the purpose and the effect prongs of the *Lemon* test, the district court properly determined that the censored actions, when viewed in their entirety, violated the Establishment Clause of the first amendment. The censored conduct therefore substantially infringed on the rights of Mr. Roberts' students.[12] Because "[t]he

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[12] In *Engel v. Vitale*, 370 U.S. 421, 431 (1962), the Supreme Court recognized that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to con-

State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion," *Lemon*, 403 U.S. at 619, we conclude that the school district's actions were not constitutionally infirm.

V. Costs

As a final matter, plaintiffs complain that the district court erred when it awarded defendants their entire costs. Plaintiffs note that the district court ordered defendants to return the copy of the Bible to the school library and enjoined them from removing it in the future. Thus, plaintiffs argue that the defendants were not "prevailing parties" on all issues within the meaning of Rule 54(d) of the Federal Rules of Civil Procedure.

Under Rule 54(d), "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d). We acknowledge that defendants in this case are not "prevailing parties" on the issue relating to the Bible in the school library. Thus, this case presents a situation where both parties have "prevailed" on at least one claim.

In reviewing the district court's decision to impose costs, we reverse only for an abuse of discretion. *See Howell Petroleum Corp. v. Samson Resources Co.*, 903 F.2d 778, 783 (10th Cir. 1990). In this case, we conclude that the district court's decision to award costs to the party that prevailed on the vast majority of issues and on the issues truly contested at trial was not an abuse of discretion.

We first note that the dismissal of most of plaintiffs' claims makes defendants the prevailing party on those issues. 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2667 (2d ed. 1983). We re-

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form to the prevailing officially approved religion is plain." Such coercive pressure is surely at its peak when the religious minorities are impressionable children who look to their teacher as a role model.

cently held that it was not an abuse of discretion for a district court to refuse to award costs to a party that was only partially successful. *See Howell*, 903 F.2d at 783. We now hold that the district court in this case did not abuse its discretion when it awarded full costs to the party prevailing on the majority of claims and the central claims at issue. Other circuits have upheld awards of full costs to a party prevailing in only part of a case. *See United States v. Mitchell*, 580 F.2d 789, 793 (5th Cir. 1978); *K-2 Ski Co. v. Head Ski Co., Inc.*, 506 F.2d 471, 477 (9th Cir. 1974). Our holding is based on the broad discretion of the district court. As Professor Moore has noted, under Rule 54 the district court has discretion to award costs to a nonprevailing party. J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* § 54.70[4] (2d ed. 1988). "[W]here the court exercises its discretion the identification of the prevailing party may become so unimportant as to be almost immaterial." *Id.* Accordingly, we affirm the district court's exercise of its discretion in awarding costs to defendants.

VI. Conclusion

Mr. Roberts' Establishment Clause claims fail because the school district acted for the valid purpose of preventing him from promoting Christianity in a public school. Moreover, the primary effect of the school district's actions was not to send a message of disapproval of Christanity. If we must draw any message from the district's actions, then that message must be that the district properly disapproves of classroom activity that appears to promote a particular set of religious concepts.

As for Mr. Roberts' free speech and academic freedom arguments, we conclude that the district's removal of two Christian books from the classroom shelves and its directive ordering Mr. Roberts to cease his silent Bible reading in the classroom did not violate the first amendment. Mr. Roberts' conduct, in the context of a fifth-grade class

full of impressionable children, had the purpose and effect of communicating a message of endorsement of religion in a manner that might reasonably be perceived to bear the imprimatur of the school.

We conclude further that the district court correctly dismissed the claims of the student and parent plaintiffs for lack of standing. None of the students were in Mr. Roberts' class at the time this suit was filed. Thus, none of the students had standing for purposes of injunctive relief. Although the students and parents also asserted claims for damages, plaintiffs failed to preserve those claims for appeal. We thus affirm the district court's dismissal of all the student and parent plaintiffs' claims.

Finally, we conclude that the district court did not abuse its discretion when it awarded the defendants their costs.

The judgment of the district court is therefore AFFIRMED.

BARRETT, Senior Circuit Judge, dissenting:

I respectfully dissent.

The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." The Founding Fathers were specially concerned that these United States would not labor under a state sponsored church or religion. The United States Supreme Court has made it abundantly clear that the Constitution does not require complete separation of church and state and that it "[a]ffirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. See, *e.g.*, *Zovach v. Clauson*, 343 U.S. 306-314, 315 (1952); *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 211 (1948)." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). I believe that those mandates were violated by Principal Madigan and the School District in this case. Their actions forbidding Mr. Roberts from reading his Bible during his fifth grade class' 15-minute silent reading period and ordering the removal of the two challenged books from his classroom library were acts of intolerance, lack of accommodation and hostility toward the Christian religion.[1]

There is no assertion by Mr. Roberts that his reading the Bible during the class silent reading period was an exercise compelled by his religious beliefs. *See Sherbert*

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[1] Principal Madigan also requested that Mr. Roberts remove a poster depicting a mountain scene with the inscription: "You have only to open your eyes to see the hand of God." Mr. Roberts complied with the request and, at trial, did not challenge the poster's removal. Thus, the poster should not be considered when determining whether the defendants violated the Establishment Clause by prohibiting Mr. Roberts' other practices. Even if the poster *were* to be considered, I believe that its nonsectarian reference to "God" is, at best, only minimally relevant to the issue of whether Mr. Roberts was unconstitutionally promoting Christianity in the classroom.

v. Verner, 374 U.S. 398 (1963). By the same token, this is not a case involving a religious practice in violation of a state statute. *Employment Div., Oregon Dept. of Human Resources v. Smith*, —— U.S. ——, 58 U.S.L.W. 4433 (April 19, 1990) (claimed religious use of peyote cannot prevail under the Free Exercise Clause in light of Oregon's statute declaring it a felony to knowingly possess the drug); *Reynolds v. United States*, 98 U.S. 145 (1879) (religious belief in polygamy cannot prevail over state criminal statute outlawing the practice). Thus, in the instant case, none of Mr. Roberts' practices constituted any *per se* violation of any Colorado law, custom or policy. Accordingly, the district court should have judged the case with a view to accommodate Mr. Roberts' practices. The burden was cast on the school district to demonstrate, as the majority opinion now agrees, that Mr. Roberts' challenged practices materially and substantially interfered with the operation of the school. This burden is analogous to the "compelling governmental interest" test announced in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which requires that religious liberty under the Free Exercise Clause of the First Amendment cannot be interfered with or encroached upon, directly or indirectly, unless required by clear and compelling governmental interests "of the highest order." *Yoder*, 406 U.S. at 215.

It is a far cry from tolerance and accommodation toward Christianity to interpret the practices in Mr. Roberts' classroom as "teaching" or "endorsement" of Christianity in violation of the Establishment Clause. I observe that such *findings* by the district court, which the majority here upholds under either the clearly erroneous standard or the *de novo* standard, have no basis in *any* aggrieved testimony of fifth grade students or their parents, past or present. The only "live" complainant in this case was Principal Madigan, whose views on separtion of church and state are absolute. She applied a "bright line" approach. The district court's "findings"

are really legal conclusions. There is no basis, other than speculation, for implying, as does the majority opinion, that the practices in Mr. Roberts' classroom constituted religious indoctrination. (Slip Opinion, pp. 17-19). Presumably, such would not have been the case had Mr. Roberts' classroom constituted religious indoctrination. (Slip Opinion, pp. 17-19). Presumably, such would not have been the case had Mr. Roberts read the books on Buddhism or Indian religions. Principal Madigan did not object to them. Thus, it seems that any concern that elementary children are "vastly more impressionable than high school or university students," (Appellee's Briefs, p. 32), cannot be a serious defense. In this case, it was Principal Madigan and the School District who violated the Establishment Clause.

In the following Supreme Court opinions interpretive of the Establishment Clause in the context of the public schools, it is important to note that the condemned activity was openly pursued or actively—rather than passively—sponsored: *Stone v. Grahamn*, 449 U.S. 39, *reh. denied*, 449 U.S. 1104 (1980) (held that the posting of a copy of the Ten Commandments on the wall of each public school room violated the Establishment Clause because no secular purpose had been demonstrated); *Engel v. Vitale*, 370 U.S. 421 (1962) (formulated prayers which were required to be repeated by students in public schools violated Establishment Clause); *McCollum v. Board of Education*, 333 U.S. 203 (1948) (released time arrangement whereby students who wished could attend religious instruction classes during regular school hours in public school buildings, held to be violative of Establishment Clause by virtue of use of tax-supported property to promote religion).

In those cases where a religious exception has not been allowed from a state statute or regulation, the Supreme Court has cast the burden on the government to rely on more than mere speculation about potential harms; the

government has been required to present evidentiary support for a refusal to allow a religious exception. *United States v. Lee*, 455 U.S. 252, 257-258 (1982) (The government must demonstrate that unbending application of its regulation to a religious objector is essential to accomplish an overriding governmental interest); *Thomas v. Review Board of Indiana Employment Security Div.*, 450 U.S. 707, 719 (1981), (rejected the state's reasons for refusing to grant a religious exemption for failure to demonstrate that the means employed were the least restrictive means of achieving a compelling state interest because no evidence in the record supported the state's reasons).

Cases involving the challenges presented here must necessarily be decided on a case-by-case basis. A person in Mr. Roberts' position as an elementary school classroom teacher must be alert to the possibility that actions on his part could constitute government actions violative of the Establishment Clause without further evidence. For example, in a less discreet classroom scenario than that presented in the case at bar, a violation could be found to exist. However, unlike *Stone*, *Engel*, and *McCollum*, the activities here were passive and *de minimis*. If the condemned activities in this case could, by simple inference, be held to be violative of the principle of separation of church and state, reliance would necessarily have to weigh almost entirely on the proposition that Mr. Roberts' fifth graders were ages 10 or 11 and thus easily proselytized. The problem is simply that there is *no evidence* to support such a bald conclusion. No students or parents testified in support of Principal Madigan or the School District. No witness protested that Mr. Roberts' practice of reading from his Bible or the maintenance in his classroom library of the two condemned books were motivated by Mr. Roberts' intention to promote belief in Christianity. Under these circumstances and on the record made, I would hold that the activities did not amount to an intrusion on the separation of church and state principle.

Where disputes arise over government restrictions on a person's exercise of a religious practice (here, Mr. Roberts' desire to read from his Bible during the silent 15-minute class reading period), the court must determine whether the government has demonstrated a compelling interest in enforcing its policy (here, Principal Madigan's separation of church and state principle) and whether the policy represents the least restrictive means of fulfilling the governmental interest. *Wisconsin v. Yoder*, *supra*; *Sherbert v. Verner*, *supra*. Although he does not specifically so argue, Mr. Roberts' practice of reading his Bible during the class 15-minutes silent reading period was a minimal, discreet exercise of the Free Exercise Clause of the First Amendment. As such, Principal Madigan and the School District unduly burdened Mr. Roberts' rights. *See Hernandez v. Commissioner*, 490 U.S. —— (1989); *Wisconsin v. Yoder*, *supra*, at p. 220.

The majority has come to agree that the "substantial interference" standard of review set forth in *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969), applies here. In *Tinker*, three public school pupils were suspended from school for violating a school policy, of which they were aware, by wearing black armbands in protest of the government's policy in Vietnam. The students were quiet and passive, just as was Mr. Roberts, and they did not impinge upon the rights of others. There is no evidence that Mr. Roberts' actions impinged upon the rights of others.

The *Tinker* court observed that the armband display "does not concern aggressive, disruptive action or even group demonstrations" and that there was no evidence that the armband display interfered with school work or collided with the rights of other students to be let alone. *Id.* at 508. By the same standard, there is no evidence that Mr. Roberts' actions interfered with school work or collided with the rights of the students. *Tinker* required evidence demonstrating that "[e]ngaging in the forbid-

den conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school . . . .'" *Id.* at 509. There is not a scintilla of evidence in the case at bar demonstrating that any of Mr. Roberts' practices materially and substantially interfered with the appropriate operation of the school. Thus, I submit that, under the strict *Tinker* standard, the defendants-appellants failed to carry their burden of proof.[2] This is a case in which to promote tolerance. In my view, under the strict standard of *Tinker*, the defendants failed to prove that Mr. Roberts' behavior "materially and substantially interfere[d] with . . . the operation of the school." *Tinker*, 393 U.S. at 509.

The maintenance of the two challenged books in Mr. Roberts' classroom library was entirely passive in character, just as was Mr. Roberts' practice of reading his Bible during the class' 15-minute silent reading period. These books were not assigned to the students and there is no evidence that Roberts ever referred the students to

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[2] The majority relies on *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) to bolster its position that school officials have broad discretion in controlling school activities (Footnote 10, p. 23 of Majority Slip Opinion). The problem is that *Kuhlmeir* differentiated between "personal expression that happens to occur on the school premises" protected under *Tinker* (which governs Mr. Roberts' practices) and school activities "[t]hat students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Kuhlmeir*, 484 U.E. at 271. The *Tinker* standard, it is agreed, controls in this case. The "substantial interference" standard applied in *Tinker* is far less deferential than the "greater control" standard applied in *Kuhlmeir*. It is to be noted that *Kuhlmeir* involved the constitutional right to the high school principal to censor certain articles submitted for publication in the student newspaper. It was in that context that the Supreme Court upheld the principal's actions as being "[r]easonably related to legitimate pedagogical concerns." 484 U.S. at 273. In the instant case, Principal Madigan's actions did not involve educational concerns calling for the expertise of school officials; on the contrary, she exercised a judgment involving a conflict relating to basic constitutional values.

them. Furthermore, Roberts' practice of reading his Bible while seated at his desk during the class 15-minute silent reading period was carefully exercised. Under these circumstances, the School District did not prove that there was a compelling governmental interest justifying its command that Mr. Roberts refrain from reading his Bible during the 15-minute silent reading period, and remove the two books from the classroom library. "First Amendment rights must always be applied in light of the special characteristics of the . . . environment in the particular case." *Tinker*, 393 U.S. at 506.

In *Lynch v. Donnelly*, *supra*, the Supreme Court majority observed:

> The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded that there was no question that the statute or activity was motivated wholly by religious considerations. See, *e.g.*, *Stone v. Graham*, *supra*, at 41; *Epperson v. Arkansas*, 393 U.S. 97, 107-09 (1968); *Abington School District v. Schempp*, *supra*, at 223-224; *Engel v. Vitale*, 370 U.S. 421, 424-425 (1962). Even where the benefits to religion were substantial, as in *Everson v. Board of Education*, 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Walz*, *supra*; and *Telton*, *supra*, we saw a secular purpose and no conflict with the Establishment Clause. Cf. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

465 U.S. at 680.

In my view, the *Lemon v. Kurtzman*, 403 U.S. 602 (1971) test is inapplicable in the instant case, simply because the actions condemned here are not of the type or character sufficient to implicate government entanglement with religion. In reality, out of concern for a "bright line" demand for separation of church and state,

the defendants effectively denied Mr. Roberts that degree of tolerance to which he is entitled. At the evidentiary hearing conducted by the district court on the injunction issue, two witnesses, the school's librarian and music teacher, testified that Principal Madigan removed the Bible from the main school library in keeping with her concept of separation of church and state. While the district court did not agree with Principal Madigan's action in removing the Bible from the main school library (the district court enjoined Principal Madigan and the School District from removing the Bible from the school library), the court did uphold her actions, approved by the School District, in ordering Mr. Roberts to remove his Bible from his desk, not to read from his Bible during the 15-minute silent reading period and to remove "The Bible in Pictures" and "The Story of Jesus" from his 239-book classroom library. I would hold that Principal Madigan's actions were constitutionally unwarranted and that the district court was clearly erroneous. Principal Madigan insisted on the *obliteration* of all Christian books from the school premises. Her extreme stance would convert the "primary effect" prong of the Establishment Clause into governmental disapproval, disparagement and hostility toward the Christian religion.

There is nothing in the record demonstrating, *in fact*, that Mr. Roberts' placement of his personal Bible on his desk, his habit of reading the Bible during the class' 15-minute silent reading period or the placement of the above-referred to books in the classroom library had a coercive effect on or that it tended to proselytize Mr. Roberts' fifth grade students. Any concerns voiced in regard to the Establishment Clause impact are entirely speculative.

There is no evidence that Mr. Roberts at any time ever spoke to his students concerning his possession of a Bible or his preference in reading from it. Thus, there is no evidence of any "coercive" effect. Furthermore,

there is no evidence that Mr. Roberts ever assigned any members of his fifth grade class to read any of the books in his classroom library, including a book on Buddhism and a book on American Indian religions.

In my view, the district court erred in drawing any distinction between the maintenance of the Bible in the school library while denying the simple maintennace of "The Bible in Pictures" and "The Story of Jesus" in the classroom library. Not one word was spoken by Mr. Roberts concerning the Bible, his reading of the Bible, or of the two condemned books in his classroom library which could involve any successful application of the *Lemon* test in favor of the state out of concern for violation of the Establishment Clause of the First Amendment.

In *Marsh v. Chambers*, 463 U.S. 783, 792 (1983), the Supreme Court majority held that the practice of opening each daily session of the Nebraska legislature with a prayer by a chaplain paid by the State did not violate the Establishment Clause of the First Amendment because the practice had become historically accepted as "[p]art of the fabric of our society." Mr. Justice Brennan, joined by Mr. Justice Marshall, dissented. They would hold the legislative prayer practice violative of the Establishment Clause. No one can logically argue that the daily prayer practice in *Marsh* could meet the test of the first prong of the *Lemon v. Kurtzman* test, i.e., the statute (or practice) must have a secular legislative purpose. And no justice on the Supreme Court in *Marsh* raised the contention addressed in *Engel v. Vitale, supra*, that the legislature's daily prayer imposed an impermissible endorsement of prayer in public facilities or that it had a coercive effect upon non-religious minorities to conform.

The 15-minute silent reading period was not a religious exercise. Just as a moment of silence does not endorse prayer over other alternative, in my view, the fact that

Mr. Roberts sometimes used the 15-minute silent reading period reading from his Bible does not, *ipso facto*, convey a message to his students that they should follow suit.

The Free Exercise Clause of the First Amendment mandates that the government not prohibit or interfere with the free exercise of religion. The clause imposes a burden on the government to facilitate the free exercise of religion. In that sense, the government is promoting a religious purpose and if the first and second prongs of the *Lemon* test were to apply, the Free Exercise Clause would necessarily fail because the government would not be pursuing a secular purpose, and the primary effect would be to advance religion.

In *Wallace v. Jaffree*, 472 U.S. 38 (1985), the Supreme Court struck down an Alabama statute authorizing a 1-minute period of silence in all public schools for "meditation or volutntary prayer" because the majority held that the established purpose was to endorse religion, and the enactment was not motivated by any clearly secular purpose. The Court majority applied to *Lemon* test.

Then-Chief Justice Warren Burger, in his dissent in *Wallace v. Jaffree*, made the following pertinent observations with which I agree and which I believe to be fully consistent with the majority opinion in *Lynch v. Donnelly*, *supra*, and applicable here:

> [T]he Court's extended treatment of the 'test' of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) suggests a naive pre-occupation with an easy, bright-line approach for addressing constitutional issues. We have repeatedly cautioned that *Lemon* did not establish a rigid caliper capable of resolving every Establishment Clause issue, but that it sought only to provide 'signposts . . . .' [O]ur responsibility is not to apply tidy formulas by rote; our duty is to deter-

mine whether the statute or practice at issue is a step toward establishing a state religion.

* * * *

[T]he statute does not remotely threaten religious liberty; it affirmatively furthers the values of religious freedom and tolerance that the Establishment Clause was designed to protect. Without pressuring those who do not wish to pray, the statute simply creates an opportunity to think, to plan, or to pray if one wishes—as Congress does by providing chaplains and chapels. It accommodates the purely private, voluntary religious choices of the individual pupils who wish to pray while at the same time creating a time for non-religious reflection for those who do not choose to pray. The statute also provides a meaningful opportunity for school children to appreciate the absolute constitutional right of each individual to worship and believe as the individual wishes. The statute 'endorses' only the view that the religious observances of others should be tolerated and, where possible, accommodated. *If the government may not accommodate religious needs when it does so in a wholly neutral and non-coercive manner, the 'benevolent neutrality' that we have long considered the correct constitutional standard will quickly translate into the 'callous indifference' that the Court has consistently held the Establishment Clause does not require.* (Emphasis supplied).

472 U.S. at pp. 89-90.

I would reverse the judgment of the district court and hold, on the record before us, that plaintiff Roberts has demonstrated that the defendants violated the Establishment Clause by requiring the removal of the two books from his classroom library and by barring him from reading or displaying his Bible during the class' 15-minute silent reading period.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 88-F-1908

KENNETH ROBERTS; MARC NELSON and ZAY NELSON, parents and next friends of KELLY NELSON and AMY NELSON; DEBRA JEAN WHITE, parent and next friend of KELLY WHITE,

Plaintiffs,

vs.

KATHLEEN MADIGAN, in her official capacity as principal of Berkeley Gardens Elementary School, and ADAMS COUNTY SCHOOL DISTRICT NO. 50,

Defendants.

MEMORANDUM OPINION AND ORDER

[Filed Jan. 5, 1989]

Chief Judge Sherman G. Finesilver

Plaintiff Kenneth Roberts, a fifth grade teacher, is joined by parents of several children in his school in seeking injunctive and declaratory relief against officials of School District No. 50. Plaintiffs challenge defendants' removal of two religiously oriented books in Roberts' classroom library. Plaintiffs seek further relief from defendants' directive that Roberts keep his Bible out of sight, and refrain from silently reading it, during classroom hours.

Jurisdiction is invoked pursuant to 28 U.S.C. §§ 1131, 1343, and the First and Fourteenth Amendments to the

Constitution. The hearing on the preliminary injunction was merged with the trial to the court pursuant to F.R. Civ.P. 65(a)(2).

Plaintiffs assert that defendants have abridged their First Amendment rights of Free Speech, Academic Freedom, and Access to Information. Plaintiffs further allege that defendants have violated the Establishment Clause of the First Amendment.[1]

The parties in this litigation are as follows:

> Plaintiffs Kenneth Roberts, a fifth grade teacher at Berkeley Gardens Elementary School in Adams County School District No. 50, Westminster, Colorado.
>
> Plaintiffs Marc and Zay Nelson, the parents of Plaintiffs Kelly and Amy Nelson, neither of whom is in Roberts' class. Kelly Nelson was a student in Roberts' class during the 1987-88 school term.
>
> Plaintiff Debra Jean White, the parent of Plaintiff Kelly White, who is not in Roberts' class.
>
> Defendant Kathleen Madigan, in her official capacity as principal of Berkeley Gardens Elementary School.
>
> Defendant Adams County School District No. 50. ("the District").

By this Order, we hold that Roberts' request for injunctive relief is denied. We direct that the Bible be returned to the school library at Berkeley Gardens Elementary School, Adams County, Colorado. We further

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[1] The Establishment and Free Exercise Clauses refer to the following provision of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

The Free Speech clause refers to the following First Amendment provision: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

hold that parents whose children are not presently in Roberts' class have no standing to challenge the defendants' actions as to Roberts.

Accordingly, the court enters the following findings of fact and conclusions of law.

I. *Facts*

Events giving rise to this litigation transpired during the school term from September of 1987 to June of 1988.

Roberts' testimony at trial revealed the following facts. During a parent/teacher open house in September of 1987, Madigan received a complaint from a parent regarding the presence of two books, *The Bible in Pictures* (Plaintiffs' Exhibit 5), and *The Life of Jesus* (Plaintiffs' Exhibit 6), in Roberts' classroom library. These books are not part of the District's approved curriculum for fifth grade students.[2]

Madigan quickly perused the books and directed Roberts to remove them from the classroom library. She also ordered that he take down a poster which was prominently displayed in the classroom. (Plaintiffs' Exhibit 7(a)).[3] Roberts complied with this directive immediately and without argument.

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[2] *The Bible in Pictures* is a 319-page volume with over one thousand illustrations. The illustrations are designed to provide both children and adults with a better understanding of the Bible. In the book's preface, the author states "I pray that this book may bring a fresh vision of Christ, and God's purpose in Him, to you who now read it in the midst of the heartache and frustration of the modern world."

The Story of Jesus is a 128-page volume which depicts through illustrations and text the birth, life, and resurrection of Jesus Christ. The book concentrates on the teachings of Jesus of Nazareth with the underlying premise that he is the Son of God.

[3] The poster depicts a mountain scene with the inscription: "You have only to open your eyes to see the hand of God". The removal of the poster is not contested in this case.

Madigan asked no questions regarding the books' use before ordering their removal. Her explanation to Roberts at the time was that "separation of church and state" required that the books be removed. Madigan then noticed the Bible which Roberts kept on his desk and requested that he keep it out of sight during classroom hours.[4]

Madigan had spoken to Roberts about the Bible on his desk on previous occasions. During a routine visit to Roberts' classroom, Madigan observed that Roberts was silently reading the Bible during a class session. Feeling that Roberts should have been actively teaching the class instead of silently reading, she directed him to keep the Bible in his desk between the hours of 8:00 and 3:30. Roberts claims that his reading was part of the lesson plan which he submitted to Madigan and which she approved. (Plaintiffs' Exhibit 0). However, the lesson plan does not specifically provide that Roberts is to read during this period, nor that Madigan in any way approved his doing so.

Madigan saw Roberts reading the Bible in front of the students a second time and again directed him to keep the Bible out of sight during school hours. It was at this time that Madigan received the parents' complaint at the open house.

Roberts later questioned Madigan whether he should be required to "hide" the Bible, comparing his use of the Bible and the religious materials in his classroom to the pledge of allegiance, which contains the phrase "one nation under God". Madigan conferred with school officials after this discussion, and they affirmed her decision. Roberts asked for written guidelines as to what types of material he could keep in his classroom. Madigan denied this request, stating that common sense and her previous remarks were sufficient.

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[4] The Bible in question is the King James version published in 1968 by the National Publishing Company.

Roberts made a written request for the guidelines. (Plaintiffs' Exhibit 10). He subsequently met with other officials in the District, but to no avail. In response to the written request, Madigan again conferred with higher officials and legal counsel for the District. As a result of that meeting the following directive was issued to Roberts:

> The law is clear that religion may not be taught in a public school. To avoid the appearance of teaching religion, I have given you this directive. Failure to comply with this directive will be considered insubordination and could result in disciplinary action. (Plaintiffs' Exhibit 12).

Roberts' classroom library contains approximately 237 books of varying content, including *A Tale of Two Cities*, *Tom Sawyer*, and *The Prince and the Pauper*. (Plaintiffs' Exhibit 1). The books are made available to students for a daily fifteen-minute independent reading period. Students are free to choose the books which they reading during this time and may bring books from home or other libraries.

Roberts reads his own books during the independent reading time, in order to "set an example to the students of an adult reading". (Complaint, paragraph 11). Frequently, the book he reads in front of the students is the Bible, which is left on his desk throughout the school day. Roberts testified that he never reads aloud from the Bible, nor proselytizes about his faith to the students. There are no allegations of personal hostility on the part of defendants toward plaintiffs' religious views.

The parties dispute whether Madigan removed the Bible from the Berkeley Gardens school library. Defendants do not seriously contest the replactment of the Bible in the school library; however, the Bible has yet to be replaced.

Specifically, the court confronts the following issues in this litigation: (1) Whether Roberts' actions consti-

tute a violation of the Establishment Clause; (2) Whether the District's actions constitute a violation of Roberts' right to free speech and academic freedom; and (3) Whether the student plaintiffs and their parents have standing to challenge the District's actions toward Roberts.

II. *The First Amendment*

At controversy in this case is the complex relationship between religion, public education, and the First Amendment.[5] When we speak of government in the context of this case, we include public education within its meaning. The term "secular" is used by its common definition.[6]

The First Amendment sets forth fundamental principles governing the reaches of government and religion, stating that *"Congress shall make no law respecting an Establishment of religion, or prohibiting the free exercise thereof. . . ."* (Emphasis added). There are thus two distinct provisions restricting and controlling government authority over religion: the Establishment Clause and the Free Exercise Clause. The Fourteenth Amendment, as interpreted by the Supreme Court, extends these limits on governmental power to state and local governments, including school districts, their officials, and employees.[7]

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[5] For an overview of the often turbulent relationship between religion and public education, see Leo Pfeffer, God, Caesar and the Constitution (1975); Leo Pfeffer, Church, State, and Freedom (revised ed.) (1967); John H. Laubach, School Prayers (1969); Rodney K. Smith, Public Prayer and the Constitution (1984); William D. Valente, Education Law, Pubic and Private (1985); Kern Alexander and M. David Alexander, American Public School Law (2nd ed. 1985).

[6] Webster's New International Dictionary (2d Ed. 1950) defines secular as "not religious in character nor devoted to religious ends or uses".

[7] *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 215-16, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). ("The fundamental concept of liberties embodied in the [Fourteenth] Amendment embraces the

Constitutional debates over the role of religion in public education often involve a complex interplay between the Free Exercise and the Establishment Clauses.[8] Each clause serves a different purpose: the goal of the Free Exercise Clause is to keep religious faith voluntary—free from government coercion—while the goal of the Establishment Clause is to prevent excessive government involvement in religion.

The Free Exercise Clause prevents government from impairing the liberty of individuals to exercise their religious faith. The clause governs conflicts between religious faith and government actions that through coercion make it more difficult to hold the beliefs and engage in the practices of such faith. *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). It provides absolute protection for freedom to hold religious beliefs but only qualified protection for freedom to engage in religious activities.

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liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws."

[8] The relationship of the Establishment and Free Exercise Clauses was first discussed in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The Court stated that the

> "inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—the freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."

The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended. *Abington School Dist. v. Schempp*, 374 U.S. 203, 223 (1963).

To resolve disputes over government interferences with religious faith, courts weigh the strength of a person's interest in exercising the beliefs and practices in question, against the government's interest in a policy which limits the exercise of faith, and the degree of burden imposed by the limitation. *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). If a governmental policy interferes with the person's freedom to exercise his faith, the government agency must show that its interest in enforcing the policy is sufficiently compelling to override the person's religious rights and that the policy represents the least restrictive way of fulfilling the government's interest. *Sherbert v. Verner*, 374 U.S. 398, 407, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1962).

The Establishment Clause mandates government neutrality concerning religion while unequivocally separating the reaches of church and state. The clause prohibits state or federal support of religion and defines the parameters of the relation between government and religion:

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of non-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion.

Epperson v. Arkansas, 393 U.S. 97, 103-4, 89 S.Ct. 266, 21 L.Ed. 228 (1968).

State activity in religious matters must pass a three-part test in order to comport with the Establishment Clause. The activity must:

> (1) reflect a clearly secular purpose; (2) have a primary, as opposed to incidental, effect which

neither promotes nor inhibits religion; (3) not foster excessive government entanglement with religion.

If the activity fails any one of the three parts, then a constitutional violation has taken place. *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L.Ed.2d 745 (1971). At times it may appear that the above test results in uncertainty and ambiguous answers. However, it provides a workable analytic framework by which to review religious activities in public education.

Roberts does not bring his action under the Free Exercise Clause, but rather, bases it upon the Free Speech Clause. We consider Roberts' cause of action under both Clauses. Under the facts of this case, Roberts' choice of Clauses does not alter the results of an Establishment Clause analysis. The Supreme Court has stated that the various Clauses of the First Amendment are unified and interwoven together by the individual's right to freedom of conscience.[9] Both the Free Speech and Free Exercise Clauses protect the freedom to express religious views, yet both are subject to the strictures of the Establishment Clause.[10]

In public education, an individual's right to free speech is not absolute. It may be limited if exercise of that right

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[9] "[I]t may be doubted that any of the great liberties insured by the First Amendment can be given a higher place than the others. All have preferred position in our basic scheme. *Schneider v. State*, 308 U.S. 147 (1939); *Cantwell v. Connecticut*, 310 U.S. 296 (1939). All are interwoven together. Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources and functionings." *Wallace v. Jaffree*, 472 U.S. 38, 50 n.35, 105 S.Ct. 2479, 86 L.Ed.2d 645 (1984) (citing *Prince v. Massachusetts*, 321 U.S. 158, 164, 64 S.Ct. 438, 88 L.Ed. 645 (1944).

[10] The Free Speech Clause clearly protects the rights of individuals to speak on religious topics. *Widmar v. Vincent*, 454 U.S. 263, 268-69, n.6, 102 S.Ct. 273-74, n.6, 70 L.Ed.2d 440 (1981). However, those rights may be limited by the Establishment Clause. *Breen v. Runkle*, 614 F.Supp. 355 (D. Mich. 1985), citing *Widmar*, 454 U.S. at 276. The *Breen* case provides a discussion on some of the issues in this case.

materially and substantially interferes with the rights of others. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513, 89 S.Ct. 733, 740, 21 L.Ed.2d 731 (1969). When such interference occurs, a constitutional conflict of the highest order is presented. *Breen v. Runkel*, 614 F.Supp. 355 (D. Mich. 1985).

III. *The Bible in the School Library*

Of particular importance in this litigation is the legal propriety of keeping the Bible in a school library. The Supreme Court has described the library as "a mighty resource in the marketplace of ideas". *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J. dissenting). A school library "is a place dedicated to quiet, to knowledge, and to beauty." *Board of Education v. Pico*, 457 U.S. 853, 868 (1981) (citing *Brown v. Louisiana*, 383 U.S. 131, 142 (1966). It is a place where "students must always remain free to inquire, to study and to evaluate, to gain maturity and understanding." *Board of Education v. Pico*, 457 U.S. 853, 868-69 (1981) (citing *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

The school library is a mirror of the human race, a repository of the works of scientists, leaders, and philosophers. It is the locus where the past meets tomorrow, embellished by the present. The school library offers the student a range of knowledge, from the world's great novels and plays to books on hobbies and how-to-do-it projects. The importance of the school library is summed up by the inscription above the entry to the University of Colorado's Norlin library: "Who knows only his own generation remains always a child."

In this age of enlightenment, it is inconceivable that the Bible should be excluded from a school library. The Bible is regarded by many to be a major work of literature, history, ethics, theology, and philosophy.[11] It has a

[11] See, e.g., John H. Laubach, School Prayers, pp. 150-54 (1969).

legitimate, if not necessary, place in the American public school library. In this central location, it is available for voluntary perusal and study by young students possessing inquisitive minds. Youth is the time for students to explore great works of history and literature. To deprive a public school library's collection of the Bible would, in the language of Justice Robert Jackson, render the educational process "eccentric" and incomplete. *McCollum v. Board of Education*, 333 U.S. 203, 235, 67 S.Ct. 461, 92 L.Ed. 649 (1949).

The Establishment Clause does not require that religious books be removed from the shelves of school libraries. *Abington School District v. Schempp*, 374 U.S. 203, 225, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963). Public school libraries may include Bibles and other religiously oriented books provided that no one sect is favored in the library and their inclusion in the library's collection does not show any preference for religious works in general. *Evans v. Selma Union H.S. Dist.*, 193 Cal. 54, 222 P. 801 (1924). We find that the Berkeley Gardens library does not show any preference for a particular religion, or religion in general. The Bible has a legitimate place in its collection.

IV. *Religious Books in the Classroom Library*

The Bible must be distinguished from secondary religious books such as those in Roberts' classroom library. Whereas the Bible is considered a major historical and literary work, *The Bible in Pictures and The Story of Jesus* are specifically written to provide children with a better religious understanding of the Christian interpretation of the Bible. As further discussed below, the Bible has many secular uses as a primary work and a source of reference. The books in question do not possess the same secular qualities.

Similarly, the school library must be distinguished from the classroom library. Joyce Bennett, the librarian

at Berkeley Gardens, testified that the books in the school library are arranged according to subject, with the religious book section containing many volumes on various religions. (Defendants' Exhibit I).[12] In comparison, Roberts' classroom library has no arrangement by subject, with only the two books in question being religiously oriented. (Plaintiffs' Exhibit 1). This distinction mandates different constitutional results.

In the school library, a student may go directly to the religious section where he or she will find an assortment of books on various religions. The student selects books according to personal curiosity, out of the glare of teacher supervision and peer pressure. The voluntary nature of choice, combined with the variety and number of books, provides the student with protections against undue religious indoctrination. Roberts' classroom library does not afford the student the same protection and opportunity for individuality.

Attendance is compulsory in the classroom.[13] The teacher stands in a position of power as disciplinarian, role model, and educator. Students are constantly in the presence of their peers, who may observe their every action. The students are, in a real sense, a captive audience vulnerable to even silent forms of religious indoctrination.

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[12] The collection contains books on the Muslim, Jewish, Sikh, Hindu, and Buddhist faiths as well as several books on ancient Greek and European mythology. (Defendants' Exhibit I).

[13] The potential for undue influence is far less significant with regard to college students who voluntarily enroll in courses. "This distinction warrants a difference in constitutional results." *Abington School Dist. v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963). The Court has not questioned the authority of state colleges or universities to offer courses on theology or religion. See *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 273, 70 L.Ed.2d 440 (1981).

This compulsion of circumstances in the classroom has been recognized by the Supreme Court and other courts.[14] The danger of indoctrinating students with, or unduly exposing them to, religious beliefs is much greater in the classroom than in the library. *See, Edwards v. Aguillard*, —— U.S. ——, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987). An Establishment Clause analysis must consider this heightened danger in order to "prevent as far as possible, the intrusion of either [the church or the state] into the precincts of the other." *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984).

V. *Religious Books in the Classroom/ Standards for Injunctive Relief*

In order for this court to grant preliminary injunctive relief, the moving party must establish the following:

1. Substantial likelihood that the movant will eventually prevail on the merits;

2. Showing that the movant will suffer irreparable harm unless the injunction issues;

3. Proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and

4. Showing that the injunction, if issued, would not be adverse to the public interest.

Hartford House Ltd. v. Hallmark Cards, Inc., 846 F.2d 1268 (10th Cir.) *cert. denied*, —— U.S. ——, 109 S.Ct. 260, 102 L.Ed.2d 248 (1988); *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980).

The standard for permanent injunctive relief is essentially the same with the exception that the movant must

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[14] See, e.g., *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962); *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 92 N.E. 251 (1910); *State ex rel. Weiss v. District Board*, 76 Wisc. 177, 44 N.W. 967 (1890).

demonstrate actual success on the merits. *Amoco Production Company, et al. v. Village of Gambell, Alaska, et al.*, 480 U.S. 531, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987). Permanent injunctions are examined under less demanding standards than are preliminary injunctions. *Henson v. Hoth*, 258 F.Supp. 33 (D. Colo. 1966).

Roberts' case for injunctive relief fails because he cannot demonstrate success on the merits. Roberts contends that defendants have violated the Establishment Clause by removing the books from his classroom library and barring him from reading or displaying the Bible. In determining whether there has been a violation of the Establishment Clause, the court must apply the three-part test outlined above. *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). First Amendment issues are decided by the particular facts of a case. Trial courts must establish factually complete records before deciding such issues. *Breen v. Runkel*, 614 F.Supp. 355, 357 (D. Mich. 1985).

Roberts argues that defendants based their actions on an erroneous interpretation of the Establishment Clause, and thus have no legitimate reason for their actions. School officials are charged with a difficult task in exercising their broad discretion in the management of school affairs.[15] They must balance the First Amendment rights of teachers to freely exercise and express their religious preferences with the First Amendment rights of students to be free of religious indoctrination in the classroom. School officials have an affirmative duty to ensure that individual teachers are not violating the Establishment Clause, *see, Grand Rapids School District v. Ball*, 473 U.S. 373, 105 S.Ct. 3216, 3224, 87 L.Ed.2d 267 (1973), but in carrying out this duty, they must remain within the "transcendent imperatives of the First Amendment".

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[15] *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Board of Education v. Pico, 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982).

There are no certain guidelines for school officials to follow in such cases. Supreme Court rulings are inquiries based on specific facts, and the majority of the cases are by divided courts and lack unanimity. *See, e.g., Abington School Dist. v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962); *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

Roberts alleges that the District's purpose in removing the two religious books from his classroom library was to "disapprove religious books in that school." The record reflects, however, that the District's action was prompted by a secular, non-religious purpose. Madigan testified at trial that she directed the removal of the books only after parents complained to her at an open house. (Defendants' Exhibit A). The final decision to remove the books was made after consultation with school officials and legal counsel for the District as to Establishment Clause implications. We are persuaded that the District's purpose in the removal of the books was to promote religious neutrality according to the mandates of the Establishment Clause.

The record shows that the District's actions as to Roberts' reading of the Bible and his leaving it in open view on his desk were motivated by a secular purpose. Defendants were not seeking to advance other religions over Roberts', but were merely performing their "affirmative duty to ensure that individual teachers are not, through their classroom conduct, violating the guidelines of the Establishment Clause." *Levitt v. Committee for Public Education*, 413 U.S. 472, 93 S.Ct. 2814, 37 L.Ed.2d 736 (1973).

Madigan, as principal of Berkeley Gardens and Roberts' direct superior, is empowered to regulate Roberts'

classroom conduct.[16] We do not find an improper, non-secular purpose behind her decision that Roberts should have been teaching instead of reading during the independent reading period. As to her order that he keep the Bible out of the view of the students during the day, there is nothing in the record to suggest that her purpose went beyond that of insulating the students from undue exposure to Roberts' religious beliefs.

In light of the record, it is Roberts' conduct which appears to be motivated by religious purposes. As noted, the religious books in his classroom library were not related to the approved curriculum for fifth graders. Roberts never used the books for the study of any secular course of study, such as history, civilization, ethics or comparative religion. Roberts never claimed that his personal use of the Bible was non-religious. The record contains nothing to suggest that Roberts had a non-religious purpose in placing the books in the classroom library, or in reading the Bible during classroom hours. In light of these circumstances, we conclude that there was an improper religious purpose behind Roberts' use of the Bible and the presence of the religious books in his classroom library.

The primary effect of the District's actions was neither to advance nor inhibit religion. Roberts claims that the District's actions are a showing of hostility toward religion which, in effect, is a furtherance of the "religion of secularism". *See, Zorach v. Clauson*, 343 U.S. at 314,

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[16] The Supreme Court has noted:

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate constitutional values.

Epperson v. Arkansas, 393 U.S. 97, 104-05, 89 S.Ct. 266, 270, 21 L.Ed.2d 228 (1968).

72 S.Ct. 679, 96 L.Ed. 954 (1952). This argument is not persuasive.[17] The District made no attempt to replace Roberts' books with other religious books. The District made no statements to students regarding the removal of the books. The District refrained from any action which could be interpreted as an endorsement of religion or non-religion. Roberts' reading of the Bible was restricted only in the classroom setting. The primary effect of the District's actions was not to further the interests of those who believe in no religion, but to insulate students from undue exposure to Roberts' religion.

Roberts testified that he was not proselytizing or teaching religion in his classroom, but was merely providing an open reading forum where students are free to read books of their own choice. We have considered this testimony in the totality of the circumstances, and find that Roberts underestimates the potential effect of his actions on impressionable fifth grade students.

The fact that state action with respect to religion is denominationally neutral, or the fact that its observance is purely voluntary, does not serve to free the action from the limitations of the Establishment Clause. *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962). Roberts cannot expect elementary school children to discern the nuances, if any, which would indicate that there is a true neutrality in his reading of the Bible or in his selection of reading material for his class

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[17] Leo Pfeffer states: "A secular state requires a secular state school; but the secularization of the state does not mean secularization of society. Only by accepting a totalitarian philosophy, either in religion or politics or both, can the state be equated with society. We are a religious people even though our government is secular. Our democratic state must be secular, for it does not purport or seek to pre-empt all of societal life. Similarly the public school need not and should not be the totality of the education process." (as cited in Alexander and Alexander, American Public School Law (2d ed. 1985)).

library. *Bell v. Little Axe Independent School Dist. No. 70*, 766 F.2d 1391 (10th Cir. 1985).

Roberts argues that he is not actively engaged in teaching the Bible during the independent reading period. However, in our view, a teacher can be actively engaged in teaching students regardless of whether verbal interaction takes place. Roberts testified that he was reading to set an example for the children of an adult reading. We find that Roberts' choice of reading material is no less an example than his act of reading. When reading religious material in the classroom, the teacher must exercise great care so as not to advance a religious view. Taken in their totality, Roberts' reading of the Bible and the religious books and poster in his classroom present the appearance that Roberts is seeking to advance his religious views.

We are not persuaded that a teacher's discrete, inconspicuous, and silent reading of the Bible in the classroom would necessarily expose students to undue religious influence. We do not assume the anomalous position of prohibiting in the classroom the inconspicuous reading of a book which is available in the school library. Roberts' silent reading of the Bible thus presents a closer question and a more difficult balance of First Amendment rights. When a teacher's silent reading of the Bible provokes students' curiosity about the Bible's religious teachings, prompts questions from students of a religious nature, or is a subterfuge or a vehicle for advancing a particular religious view, that balance falls definitely in favor of the students and renders the presence of the Bible constitutionally impermissible.

A teacher's silent reading of the Bible does not in every instance result in a constitutional violation. Where the Bible serves as a secular educational reference, is related to an approved curriculum, or is read in such a manner that students are insulated from undue re-

ligious influence or indoctrination, then school officials may not prohibit its use or presence in the classroom.

When part of a secular course of study, use of the Bible withstands constitutional scrutiny. *Edwards v. Aguillard*, —— U.S. ——, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987).[18] A study of American history would be incomplete without reference to the Bible. The American revolution and the founding of our country cannot be taught without a discussion of religious freedom and occasional reference to the Bible.[19] Likewise, it would be impossible to understand the civil rights movement of the 1960's without reference to religious groups and their beliefs in Christianity and the Bible.

The study of literary works, such as Shakespeare, Milton, and Dante, is greatly enhanced by reference to the Bible. A study of the evolution of agricultural practices finds that Biblical law prescribed giving the land a rest every seventh year, (Exodus 23), an accepted practice in today's agricultural science. An inquiry into the roots of our modern day privilege against self-incrimination would be incomplete without reference to the Bible.[20]

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[18] The distinctions to be drawn between secular and religious uses of Biblical materials are illustrated in *Wiley v. Franklin*, 497 F.Supp. 390 (D. Tenn. 1980). The court upheld the study of the parables of Jesus regarding the uses of fables and parables as a method of teaching, and of the Biblical narrative on the establishment of the ancient Kingdom of Israel, in order to compare that saga with the problems of establishing the modern day state of Israel. The court disapproved the study of the prophecies of Daniel; of God's anger over Israel's idolatry of the golden calf; and the story of Sodom and Gomorrah as carrying an unconstitutional religious message.

[19] For example, the Liberty Bell is inscribed with the following Biblical verse: "Proclaim Liberty Throughout All The Land Unto All The Inhabitants Thereof." (Leviticus XXV-X).

[20] See *Miranda v. Arizona*, 384 U.S. 436, n. 27 (1965), where the Supreme Court traced the self-incrimination privilege back to Biblical times: "To sum up the matter, the principle that no man

The Bible's Song of Solomon may be as fruitfully studied for its poetic qualities as its religious precepts. Such a broad range of secular uses is not to be found in the two religious books in question. This distinction must be considered in an Establishment Clause analysis.

It is within the sound discretion of school officials to make an objective determination of whether a teacher's use of a Bible is consistent with a secular purpose or constitutes undue religious influence. Our ruling does not limit the power of school officials to prescribe rules of classroom conduct for their teachers. For example, Roberts does not have a constitutional right to read the Bible when the District's rules require him to be engaged in teaching his students.

Roberts argues that because he is allowed to teach American Indian religion, (Plaintiffs' Exhibits 18-20), he should be allowed to resume his reading of the Bible and replace his books in the classroom library. Roberts' argument underscores the difference between teaching *about* religion, which is acceptable, and teaching religion, which is not. *Florey v. Sioux Falls*, 619 F.2d 1311 (8th Cir.), *cert. denied* 449 U.S. 987 (1980). Roberts' teaching of American Indian religion is teaching *about* religion. It is but a part of a secular, historical course of study approved by the District as part of the curriculum for fifth grade students.[21] The students' exposure to Roberts' religious books and Bible cannot be deemed teaching about religion in the same way. We find that

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is to be declared guilty on his own admission is a divine decree." Maimonides, Mishneh Torah (Code of Jewish Law), Book of Judges, Laws of the Sanhedrin, ch. 18, § 6, III Yale Judaica Series 52-53. See also, Lamm, The Fifth Amendment and its equivalent in the Halakhah, 5 Judaism 53 (Winter, 1956). Examples of Biblical references on other subjects are included in the Appendix.

[21] Such decisions are within the discretion of school officials. *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 1261 (1968).

exposure to the tenets of a little known religion, such as those followed in American Indian culture, is far less influential on young students than exposure to a modern day, widely observed religion which is a recognizable part of our society.

We note parenthetically that Roberts incorrectly urges reliance on the decision in *Cary v. Board of Education Arapahoe School District*, 598 F.2d 535 (10th Cir. 1979), as support for his argument that his books were improperly "censored". Roberts fails to recognize that *Cary* did not deal with religious books and thus did not encounter the conflict between the Establishment Clause and the Free Speech Clause which characterizes the present case.

VI. *Freedom of Speech/Academic Freedom*

Roberts asserts that his First Amendment rights to freedom of speech and academic freedom were violated when he was ordered to remove the two religious books and refrain from reading the Bible in his classroom. It is beyond question that teachers are entitled to First Amendment freedoms in the public schools. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969). However, these rights do not "require the government to open the use of its facilities as a public forum to anyone desiring to use them." *Id.*

The teacher's right to academic freedom is far from absolute. *Sheldon v. Tucker*, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). In the public school context, an individual's free speech rights may be limited if the exercise of that right substantially interferes with the rights of others. *Tinker*, 393 U.S. at 513. The Supreme Court has never held that a teacher has a constitutional right to teach what he sees fit, nor to pre-empt parents' decisions regarding what courses their children should take. *Mercer v. Michigan State Bd. of Educ.*, 379

F.Supp. 580, 586 (E.D. Mich. 1973), aff'd mem., 419 U.S. 1081, 95 S.Ct. 673, 42 L.Ed.2d 678 (1974).

Roberts' argument graphically illustrates the tension that exists between the Establishment Clause and the Free Speech Clause of the First Amendment. A court's inquiry does not end with a conclusion that an individual has asserted a valid free speech right. The court must also decide whether the exercise of that free speech right invades the rights of others. *Breen v. Runkle*, 614 F.Supp. 355, 359 (D. Mich. 1985).

In the instant case, we must balance Roberts' right to free speech against his students' right to be free of religious influence or indoctrination in the classroom. *See, Board of Education v. Pico*, 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed. 2d 435 (1982); *Grand Rapids School District v. Ball*, 473 U.S. 373, 105 S.Ct. 3216, 3224, 87 L.Ed.2d 267 (1973). We find that the balance lies in the students' favor. Notwithstanding Roberts' arguments to the contrary, fifth grade students are vulnerable to the examples set by their teachers. As Justice Felix Frankfurter stated:

> That a child is offered an alternative may reduce the constraint, [but] it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children.

McCollum v. Board of Education, 333 U.S. 203, 227, 67 S.Ct. 461, 92 L.Ed. 649 (1949).

Families entrust public schools with the education of their children, but condition that trust on the understanding that the classroom will not be purposely used to advance religious views that may conflict with the private beliefs of the students and his or her family. *Edwards v. Aguillard*, —— U.S. ——, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987). The state and public education must there-

fore take great care to see that the coercive power which they possess through mandatory attendance and teacher role models does not serve to advance religion.

Inescapably, teachers serve as role models for their students. *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1985). Roberts concedes that he serves as a model when he reads the Bible in front of his students. Roberts argues that he exerts no influence on the students because they cannot see what he is reading when he is at his desk. Roberts makes this argument in contradiction to his admission that, over the years, at least a few students have come up to his desk and asked him about the Bible. Roberts also testified that he sometimes asks a child to come to his desk and read to him during the independent reading period.

It is unrealistic to think that bright, energetic students are oblivious to what their teacher reads. In this case, the right of students and their parents to be free of religious influence in the classroom outweighs Roberts' right to free speech/academic freedom. Roberts cannot circumvent his own violation of constitutional limits by a misplaced claim of a violation of the right to free speech/academic freedom.

VII. *Standing of Parents to Bring Suit*

Defendants assert that none of the student plaintiffs have standing to challenge the defendants' actions toward Roberts' classroom activities because none of them are presently students in his class. We agree.

Article III of the Constitution requires a party to show that he personally has suffered some actual or threatened injury that can be traced to the challenged action and is likely to be redressed by a favorable decision. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102

S.Ct. 752, 758, 70 L.Ed.2d 700 (1982). This injury must be more than the psychological consequence of observing conduct with which one disagrees. *Valley Forge*, 454 U.S. at 485.

Beyond the constitutional requirements are the following principles: (1) the plaintiff must generally assert his own legal rights; and (2) the court must refrain from adjudicating "generalized grievances" most appropriately addressed by one of the other branches of government. *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

The Supreme Court has recognized the standing of parents of schoolchildren "who are *directly* affected by the laws and practices against which their complaints are directed". *Abington School District v. Schempp*, 374 U.S. 203, 224, n.9, 93 S.Ct. 1560, 1572, n.9, 10 L.E.2d 844 (1963). (Emphasis added). However, in the instant case, it is not the rights of the student plaintiffs which are directly involved.

None of the children are presently enrolled in Roberts' class. Kelly Nelson had already graduated from Roberts' class by the time this lawsuit was filed. There is no certainty that Amy Nelson or Kelly White will have Roberts as their fifth grade teacher. There is no allegation that other classes are affected by defendants' actions as to Roberts.

The student plaintiffs have neither suffered nor are threatened with an injury which can be directly traced to the challenged actions. They cannot claim First Amendment violations for the removal of books to which they did not have access, nor for actions against a teacher in whose class they were not enrolled. *See, Doremus v. Board of Education*, 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475 (1952). They, and consequently their parents, have no standing to attack the defendants' actions with respect to Roberts.

Student plaintiffs have not suffered a violation of their right to obtain information. Even if we were to concede that the elementary school and Roberts' class are open forums which spawn a right to information, this would not overcome Roberts' violation of the Establishment Clause. *Bell v. Little Axe Independent School Dist. No. 70*, 766 F.2d 1391 (10th Cir. 1985).

ORDER

IT IS HEREBY ORDERED, that Plaintiff Ken Roberts' request for injunctive relief is DENIED. Roberts' claims and cause of action are DISMISSED. The claims and cause of action of Plaintiffs Marc Nelson and Zay Nelson, as parents and next friends of Kelly Nelson and Amy Nelson, are DISMISSED. The claims and cause of action of Debra Jean White, as parent and next friend of Kelly White, are DISMISSED.

It is further ORDERED that Defendants Kathleen Madigan and School District No. 50 replace the missing Bible in the school library of Berkeley Gardens Elementary School. Defendants Kathleen Madigan and School District No. 50 are ENJOINED from removing the Bible from the Berkeley Gardens Elementary School library in the future.

The Clerk of the Court is DIRECTED to enter judgment as directed herein. Defendants to recover their costs.

DATED this 5th day of January, 1989 at DENVER, COLORADO.

BY THE COURT:

/s/ Sherman G. Finesilver
SHERMAN G. FINESILVER
Chief Judge
U.S. District Court

APPENDIX

For further inquiry into the role of religion in public education the reader is directed to the following:

Annotation: Bible Distribution in the Schools, 45 ALR 2d 742.

Developments in the Law—Religion and State, 100 Harv. L. Rev. 1606 (1987).

J.W. Ehrlich, The Holy Bible and the Law. (Oceana Publications, Inc. 1962).

Benjamin B. Sendor, A Legal Guide to Religion and Public Education (National Organization on Legal Problems of Education 1988).

William D. Valente, Education Law—Public and Private (West Publishing Co. 1985).

Kern Alexander and M. David Alexander, American Public School Law (2d Edition, West Publishing Co. 1985).

Rodney K. Smith, Public Prayer and the Constitution (Scholarly Resources, Inc. 1987).

Sam Duker, The Public Schools and Religion (Harper and Rowe 1966).

Kenneth M. Dolbeare and Phillip E. Hammond, The School Prayer Decisions (The University of Chicago Press 1971).

John H. Laubach, School Prayers (Public Affairs Press 1969).

Leo Pfeffer, God, Ceasar and the Constitution (Beacon Press 1975).

Leo Pfeffer, Church, State and Freedom (Beacon Press 1967).

Biblical References on Selected Subjects:

Restitution and Damages: Exodus 22:1, Leviticus 6:2

Usury: Ezekiel 18:13

Education: Ecclesiasticus 7:23, Psalm 15

Health: Ecclesiasticus 30:14, 15

Legal Systems: Deuteronomy 16:18

Music: Second Samuel 6:5

Athletics: First Corinthians 9:24-27

Education: Ecclesiasticus 7:23

Employer-Employee Relations: Colossians 3:22—4:1

Labor Law: Deuteronomy 24:14, Jeremiah 22:13

Contracts: 1 Kings 5:8—11

Statutes of Limitations: Deuteronomy 15:1, 2

Animal Husbandry: John 10:11

Bailments: 22:10

Birds: Deuteronomy 14:11, 32:11

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 88-F-1908

KENNETH ROBERTS; MARC NELSON and ZAY NELSON, parents and next friends of KELLY NELSON and AMY NELSON; DEBRA JEAN WHITE, parent and next friend of KELLY WHITE,

Plaintiffs,

vs.

KATHLEEN MADIGAN, in her official capacity as principal of Berkeley Gardens Elementary School, and ADAMS COUNTY SCHOOL DISTRICT No. 50,

Defendants.

JUDGMENT

[Filed Jan. 5, 1989]

PURSUANT TO and in accordance with the Memorandum Opinion and Order entered January 5, 1989, by the Honorable Sherman G. Finesilver, Chief Judge, it is hereby

ORDERED that Plaintiff Ken Roberts' request for injunctive relief is DENIED. Roberts' claims and cause of action are DISMISSED. The claims and cause of action of Plaintiffs Marc Nelson and Zay Nelson, as parents and next friends of Kelly Nelson and Amy Nelson, are DISMISSED. The claims and cause of action of Debra Jean White, as parent and next friend of Kelly White, are DISMISSED. It is

FURTHER ORDERED that Defendants Kathleen Madigan and School District No. 50 replace the missing Bible in the school library of Berkeley Gardens Elementary School. Defendants Kathleen Madigan and School District No. 50 are ENJOINED from removing the Bible from the Berkeley Gardens Elementary School library in the future. It is

FURTHER ORDERED that defendants shall have their costs upon the filing of a bill of costs with the Clerk of the Court within ten (10) days of the entry of judgment.

DATED at Denver, Colorado, this 5th day of January, 1989.

FOR THE COURT:

/s/ James R. Manspeaker
JAMES R. MANSPEAKER
Clerk

APPROVED:

/s/ Sherman G. Finesilver
SHERMAN G. FINESILVER
Chief Judge

APPENDIX D

EXHIBIT 12

MEMORANDUM

TO: Ken Roberts

FROM: Kathy Madigan, Principal

RE: *Directive on Religious Books and Materials in the Classroom*

This Memorandum will confirm my oral directive to you of September 10 and 11, 1987. I informed you on September 10, 1987 that a parent had complained about the presence in your classroom of two books, "The Bible in Pictures," and "The Story of Jesus", and a poster which stated "You have only to open your eyes to see the hand of God." I directed you to remove these materials from your classroom and you agreed to remove the books, but asked for clarification on the poster.

On September 11, 1987, I directed you to remove the poster. I also reminded you at that time that I had directed you last year that you were to keep your Bible out of sight of students in your desk between the hours of 8:00 am-3:30 pm. I again repeated that directive.

To avoid any misunderstanding, the two books mentioned above, "The Bible in Pictures" and "The Story of Jesus" and the poster are to be removed from your classroom and your Bible must be kept in your desk during the contract day from 8:00 am-3:30 pm.

The law is clear that religion may not be taught in a public school. To avoid the appearance of teaching religion, I have given you this directive. Failure to comply with this directive will be considered insubordination and could result in disciplinary action.

/s/ Kenneth E. Roberts — 9-24-87
Teacher Signature — Date

/s/ Kathleen A. Madigan — 9-24-87
Administrator Signature — Date

As an addendum, it should be noted that the books were removed from Mr. Roberts' classroom on Sept. 10, 1987, and the poster was removed on Sept. 11, 1987.

/s/ K.M.

/s/ K.R.

APPENDIX E

EXHIBIT 16

SCHOOL DISTRICT
ADAMS COUNTY
Berkeley Gardens Elementary
5301 Lowell Boulevard
Denver Colorado 80221
Phone 433-0137

To: Ken Roberts

From: Kathleen A. Madigan /s/ K.M.

Subject: Classroom Materials

Date: February 3, 1988

Legal counsel has reviewed the information you have presented to me. After consideration of this information, the directives I gave you previously concerning the materials in your classroom will remain in effect, and will continue to be the disposition of the district in this matter.

cc. Dr. Michael Massarotti
Michael Bassett

APPENDIX F

BOOK LIST OF KEN ROBERTS' CLASSROOM LIBRARY

A Christmas Carol (2)
A Tale of Two Cities
A Taste of Blackberries (2)
A Wrinkle in Time (2)
Across Five Aprils (2)
Adopted Jane
And This Is Laura
Angie's First Class
Animal Inn (2)
Animal World

Bees, Bugs and Beetles (2)
Ben-Hur
Benjamin Franklin
Birds
Birthdays of Freedom
Blackbriar
Blue Willow (4)
Brave Jimmy Stone
Bridge to Terabithia (2)
Budgies As Pets

Canal Boy
Can't You Make Them Behave, King George?
Captains Courageous
Carol Bird's Christmas
Champions All
Charlie Brown's Cyclopedia (5)
Charlotte's Web (4)
Christmas Ghost
Clay, Wood and Wire
Clubhouse
Coming to Crossroads
Connie's New Eyes

Dear Mr. Henshaw
Depend on Katie John
Dicey's Song
Dr. Jekyll and Mr. Hyde (2)

Eddie's Green Thumb
Edge of Manhood
Eight Exciting Adventures
Electronics (12)
Elizabeth Gail
Enjoy Gerbils, Rats and Mice
Enjoy Your Gerbils
Enjoy Your Terrarium

Feather Fin
Fishes
Flowers
Fog Magic
Fourth Grade Celebrity
Freckle Juice
Freaky Friday (2)
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No. 90-1448

In The

Supreme Court of the United States

October Term, 1990

KENNETH ROBERTS,

Petitioner,

v.

KATHLEEN MADIGAN and ADAMS COUNTY SCHOOL DISTRICT NO. 50,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals follow established precedent and correctly hold that the School District did not violate the Establishment Clause when it asked a fifth grade elementary school teacher to remove sectarian books unrelated to the curriculum from his classroom and to refrain from reading from his personal Bible and leaving it on his desk during regular classroom hours when students were present?

2. Did the Court of Appeals follow established precedent and correctly hold that the School District's actions had a secular purpose, to assure that none of the teacher's classroom materials or conduct violated the Establishment Clause?

3. Did the Court of Appeals follow established precedent and correctly hold that the teacher's use of the Bible and presence of religious books in his personal collection had an improper religious purpose and had the primary effect of advancing religion?

4. Did the Court of Appeals follow established precedent and correctly hold that an elementary school teacher did not have First Amendment rights of free speech or academic freedom to have sectarian books unrelated to the curriculum in his personal collection of books for student reading or to read from his personal Bible and leave it on his desk throughout the school day when students were present?

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No. 90-1448

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner's statement contains numerous misstatements of fact and material omissions. Respondents will address these misstatements and omissions.

A. Statement of Facts

1. Books In The Classroom

It is uncontroverted that *The Bible in Pictures* and *The Story of Jesus* were religious books. (Tr. 50) They were not related to the fifth grade curriculum and the teacher did not use them as part of any secular program of education. *Id.*

Contrary to Plaintiff's assertions, the two books in question were the only religious books in the classroom. The district court, after hearing the evidence, found that Roberts' classroom had only two religiously-oriented books. (App. 47a) The Court of Appeals agreed. (App. 21a) The teacher failed to introduce into evidence the content of any book he alleged was religious. By his own admission, Roberts testified he had a book on the life of Buddha because the class was working on an historical time line as part of the curriculum. (Tr. 34) He also admitted he talked about the religion of American Indians because Indian culture was part of the fifth grade curriculum. (Tr. 40-41, 51) Judge Finesilver and the Tenth Circuit found Roberts taught *about* Indian religion, and did not teach their religion. (App. 55a, 16a) This Court is bound by the district court and Court of Appeals determinations that the teacher failed to carry his burden of proof on this issue.

The principal, Kathleen Madigan, responded to a complaint initiated by parents.[1] She asked Roberts to

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[1] Contrary to the statement on page 4 of the Petition that one parent complained, the principal's testimony was that both parents expressed their concern. (Tr. 118)

remove the two books in response to concerns from parents. At no time did Roberts explain to Ms. Madigan how the religious books had a proper place in the approved curriculum. Petitioner has no reason to fault the principal's alleged failure to ask him how the books were being used, when to this date he has never provided a legally permissible reason for their use.

The principal asked the teacher to remove the two books because of concerns of separation of church and state. (Tr. 28) Her directive cited the need to avoid the appearance of teaching religion. (App. 55a) Ms. Madigan testified teachers could teach about religion if it was part of the curriculum. (Tr. 155)

In footnote 3 and on page 23 Petitioner notes that Ms. Madigan ordered Roberts to remove a poster from the classroom wall which stated "You only have to open your eyes to see the hand of God." What the petition neglects to reveal is that Roberts did not make the principal's directive an issue in the district court (App. 38a, n. 3), or in the court of appeals (App. 25a, n. 1).

2. Plaintiff's Bible

Roberts obtained his Bible by removing it from another elementary school library fourteen or fifteen years before this litigation. (Tr. 52) He admitted he left the Bible on his desk in his fifth grade classroom at all times. (Tr. 53-54) Roberts testified he read from the Bible during class time, and did so to model an adult reading to his

students. (Tr. 33, 53) His complaint made the same allegation (para. 11). The uncontradicted testimony of the principal was that elementary school teachers are role models, and elementary school children are impressionable. Ms. Madigan testified the teacher's reading a Bible at his desk served as a model to the children that Bible reading was something which was appropriate for them to do as well. (Tr. 150)

The students circulated around the teacher's room during the day, and could very easily have seen the Bible. (Tr. 156) There is no evidence the teacher attempted to conceal the Bible on his desk or when he was reading it. Nor is there evidence that Ms. Madigan instructed Roberts to "hide" his Bible, as asserted on page 5 of the Petition. Neither Roberts' testimony (Tr. 32), nor Ms. Madigan's testimony (Tr. 120) at trial corroborate this statement. In the previous school year, Ms. Madigan requested the teacher refrain from reading the Bible when he should have been teaching students. (Tr. 115-117)

3. Library Bible

At trial the parties agreed the library Bible would not be an issue when the School District said it would agree to replace the Bible, without admitting responsibility for its removal. (Tr. 13-15) Judge Finesilver noted the parties disputed whether Ms. Madigan removed the Bible from the school library, and that the Bible had not been replaced at the time he entered his order. (App. 40a) The district court did not find the principal removed the Bible, and concluded the school library did not show any preference for a particular religion. (App. 46a) The school

librarian testified Ms. Madigan never told her to remove any book from the school library, except on one occasion when a parent challenged the presence of a book in the library for non-religious reasons. (Tr. 89)

The library contained a children's Bible, as well as other books on Christianity. The dissent's statement that the principal insisted on the "obliteration" of all Christian books from the school premises was a gross misstatement and contrary to fact. The only person to have removed a Bible from a library in the School District was the Petitioner. (Tr. 52)

B. Course of Proceedings

Chief Judge Sherman Finesilver, after hearing testimony and argument of the parties, dismissed Plaintiff's case and entered judgment in Defendants' favor. He rejected Plaintiff's argument that the District's purpose in removing the two religious books from his classroom was to disapprove religious books in the school. He held, "The record reflects, however, that the district court's action was prompted by a secular, non-religious purpose." (App. 50a) He was persuaded that the District's purpose was to promote religious neutrality according to the mandate of the Establishment Clause.

Judge Finesilver also found that the record showed the District's actions regarding Roberts' Bible reading and leaving it in open view on his desk were also motivated by a secular purpose, performing its affirmative duty to ensure that individual teachers are not, through their

classroom conduct, violating the guidelines of the Establishment Clause. He held Ms. Madigan's order that Petitioner keep his Bible out of the view of students during the school day did not go "beyond insulating students from undue exposure to Roberts' religious belief." (App. 50a-51a)

Judge Finesilver also found in light of the record that Petitioner's conduct appeared to be motivated by religious purposes. (App. 51a) The religious books in his classroom were not used for any secular course of study and "Roberts never claimed that his personal use of the Bible was non-religious." *Id.* Finally, emphasizing the distinction drawn years before by this Court, the district court concluded Roberts' teaching American Indian religion was permissible, as it was teaching about religion as opposed to teaching religion. (App. 55a)

Petitioner's freedom of speech and academic freedom claims also failed. Balancing the teacher's right of free speech with the parents' and students' rights to be free of religious influence or indoctrination in the classroom, the court held the balance lay in the parents' and students' favor. (App. 57a-58a) He concluded that "Roberts cannot circumvent his own violation of constitutional limits by a misplaced claim of a violation of the right to free speech/academic freedom." (App. 55a)

The Court of Appeals for the Tenth Circuit affirmed. Judge McKay's opinion held the district court's conclusion that the School District had a secular purpose in taking the challenged actions was not clearly erroneous.

(App. 13a) The Court affirmed the finding that the District had a secular purpose, to ensure that none of Plaintiff's classroom materials or conduct violated the Establishment Clause. (App. 14a) The Tenth Circuit also rejected Plaintiff's argument that the removal of the two books from the classroom and disallowing the teacher to read from his Bible conveyed a message of disapproval of religion. It affirmed the district court's finding that the primary effect of the School District's actions was not to disapprove of Christianity, but to disapprove of teaching Christianity in the public schools. It therefore concluded the School District's actions did not violate the Establishment Clause. (App. 17a)

The Tenth Circuit also affirmed the district court's dismissal of Plaintiff's free speech/academic freedom claims. Applying the same test for Establishment Clause analysis, it also concluded that the teacher's actions violated the First Amendment and his conduct substantially infringed on the rights of the students. (App. 21a) It therefore concluded that the District's interest in eliminating possible constitutional violations outweighed the teacher's right to expression. (App. 21a)

SUMMARY OF ARGUMENT

The Tenth Circuit decision does not conflict with any other case, and follows established precedent. The School District acted lawfully, in accordance with its duty to maintain religious neutrality in an elementary school classroom setting. Its actions were reasonably undertaken to prevent violations of the Establishment Clause, and

these actions by themselves could not be Establishment Clause violations. This Court has reached similar conclusions in many earlier cases. Furthermore, no case has ever held that an elementary school teacher has an unfettered right to place religious books unrelated to the curriculum in an elementary school classroom or to display and read the Bible during regular classroom hours when students are present. Petitioner's actions were neither protected by the free speech clause of the First Amendment nor the concept of academic freedom.

ARGUMENT

REASONS FOR DENYING THE WRIT

I. The Court Of Appeals Correctly Held The School District's Actions Did Not Violate The Establishment Clause, While The Teacher's Actions Did.

A. Importance of elementary school setting.

This Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. *Edwards v. Aguillard*, 107 S.Ct. 2573, 2577 (1987). The Court has even noted that displays of arguably religious symbols which might be constitutional when located on government property might raise additional constitutional considerations when located in a public school. *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, ___ U.S. ___, 109 S.Ct. 3086, 3115, n. 69 (1989).

As the Court noted in *Edwards*:

> Families entrust public schools with the education of their children, but condition their trust

> on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. [citations omitted]

107 S.Ct. 2573, 2577 (1987).

Decisions of this Court have recognized this distinction with respect to government-sponsored religious exercises that are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs. *Wallace v. Jaffree*, 472 U.S. 38, 81; 105 S.Ct. 2479 (1985) at 2503 (O'Connor, J., concurring).

The fact that this is an elementary school context makes heightened scrutiny of Establishment Clause issues even more important. The lower courts in this case followed decisions in other cases which have noted that elementary school children are more impressionable than high school or university students and "cannot be expected to discern nuances which indicate whether there is true neutrality toward religion on the part of the school administration." *Bell v. Little Axe Independent School Dist. No. 70*, 766 F.2d 1391, 1404 (10th Cir. 1985). That case and others have refused to extend this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981) to elementary schools.

Moreover, the activity that is the issue of this case concerns a teacher's conduct in the classroom during school hours when students were required to be present. This activity sharply contrasts with that in *Board of Education of the Westside Community Schools v. Mergens*, ___ U.S.

___, 110 S.Ct. 191 (1990). The activity in that case was sanctioned by a federal statute, occurred outside of school hours, and involved more mature high school students. Nevertheless, the Equal Access Act still permitted employees or agents of the school to attend only in a "non-participatory capacity." 20 U.S.C. § 4071 (c)(3).

As will be discussed throughout this brief, this case follows precedents in which this Court has upheld actions of school districts to avoid violations of the Establishment Clause of the First Amendment. The Petition essentially concedes this fact, and only attempts to convince the Court to accept the case by lifting portions of this Court's prior decisions out of context.

B. Duties of school districts to avoid Establishment Clause violations.

This Court has held on several occasions that school districts have an affirmative duty to ensure that individual teachers are not, through their classroom conduct, violating the guidelines of the Establishment Clause. *Levitt v. Committee for Public Education*, 413 U.S. 472, 92 S.Ct. 2814, 37 L.Ed.2d 736 (1973). More than forty years ago, this Court emphasized its reluctance to interfere with the decisions of local school boards, *McCollum v. Board of Education*, 333 U.S. 203 (1948), and has continued that policy of non-interference with the operation of public schools. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159 (1986). This case follows several cases in which this Court has upheld school districts' reasonable actions in discharging their duties to avoid violations of the First Amendment.

C. The School District's actions satisfied this Court's three-part test in *Lemon v. Kurtzman*.

This Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111 (1971) developed a three-part test for determining propriety of governmental action under the Establishment Clause. First, state action must have a secular purpose. Second, the primary effect of any state action must be one that neither advances nor inhibits religion.[2] Finally, state action must not foster excessive government entanglement with religion. Petitioner did not argue that the School District's action violated the third part of the test, therefore only the secular purpose and primary effects tests will be addressed.

1. The School District's actions had a secular purpose, while the teacher's actions did not.

Both the district court and court of appeals correctly held the School District's actions had a secular purpose, in ensuring that none of Roberts' classroom materials or conduct violated the Establishment Clause. The Tenth Circuit stated, "The only evidence relating to the school district's motives indicates that the district simply

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[2] Petitioner misstates part of the test at page 22, where he asserts government action violates the Establishment Clause if the principal or primary effect of that action "inhibits religion." In many instances throughout the Petition, the teacher ignores the fact that *advancing* religion is also prohibited.

wanted to prevent Mr. Roberts from violating the Establishment Clause." (App. 13a) These decisions followed several years of precedent from this Court.

The appropriate role of the state with regard to religious organizations is to be neutral. This Court articulated this concept in a Bible reading decision nearly thirty years ago, as follows:

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality.

Abington School District v. Schempp, 374 U.S. 203, 226 (1963) (Brennan, J., concurring).

The lower courts' decisions that the District's actions had a secular purpose were correct and must not be disturbed.

Closely analogous to this case is *Breen v. Runkel*, 614 F.Supp. 355 (W.D. Mich. 1985). In *Breen* teachers, students and parents of students sued the state superintendent of public instruction, who allegedly directed school board members and administrators to stop religious practices in the school district. The plaintiffs alleged a constitutional right to read, pray and tell Bible stories in the classroom. The district court dismissed the complaint on the basis that the conduct of the teachers was constitutionally prohibited under holdings of *Engel v. Vitale*, 370 U.S. 421

(1962) and *Abington v. Schempp, supra*. The court held that whatever rights the teachers had, they did not extend so far under the First Amendment to permit teachers to pray or read the Bible in public school classrooms.

On page 13 of the Petition, Plaintiff quotes a portion of this Court's decision in *Stone v. Graham*, but omits the most significant point of the Court's opinion. If the full sentence had been quoted, Petitioner perhaps would have clearly understood why the very issues he seeks to have reviewed have already been settled by this Court's opinions. This is not a case in which the two religious books or the Bible were "integrated into the school curriculum" for Roberts' fifth grade class. This Court in *Stone*, in rejecting the state's argument that the purpose for posting the Ten Commandments on classroom walls was secular, stated:

> This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. [citation omitted] Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the children to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.

Stone v. Graham, 449 U.S. 39 at 43 (1980).

The evidence quite clearly showed the following:

(1) the two religious books and the Bible were not integrated into the school curriculum and, indeed, had no role whatsoever in the fifth grade curriculum; (App. 20a, 51a)

(2) there was no claim that the religious books or display of the Bible in the presence of students had any role in the study of history, civilization, ethics, comparative religion, or the like in this fifth grade class; (App. 20-21a, 51-51a)

(3) the public display and availability of these religious books and public display of the Bible by Roberts served no educational function; (App. 55a, 56a, 17a)

(4) the placement of these personal religious books and Bible by Roberts in the fifth grade classroom "had the primary effect of communicating a message of endorsement of religion to the impressionable ten-, eleven-, and twelve-year-old children in his class." (App. 20a)

Roberts' display and personal reading of the Bible in the presence of his fifth grade students during class time did not meet the criteria for appropriate use of the Bible as found in *Schempp, Epperson v. Arkansas*, 393 U.S. 97 (1968), or *Stone*.

Petitioner still appears unable to distinguish between teaching *about* religion, which is permissible, and *teaching* religion, which is not. (App. 55a-56a, 17a) *Abington v. Schempp, supra*, 374 U.S. 225; *Stone v. Graham, supra*, 449 U.S. at 43; *Florey v. Sioux Falls School District*, 619 F.2d 1311 (8th Cir. 1980); *cert. denied* 449 U.S. 987 (1980). This

misperception permeates Petitioner's argument and eventually destroys it. The quotations in the Petition on the importance of study of the Bible attributed to *Abington* (p. 24); *Epperson v. Arkansas* (p. 13); *McCollum* (p. 14); and *Edwards v. Aguillard* (p. 18), all arose in the context of the permissibility of teaching *about* religion. They in no way require deviating from those principles in this case, since by his own admission, Petitioner was not using the three books as part of the school curriculum.

2. The primary effect of the School District's actions was not to inhibit religion, while the primary effect of the teacher's actions was to advance religion.

Both the district court and court of appeals found the primary effect of the District's action did not inhibit Plaintiff's religion. Petitioner's discussion of this issue is particularly narrow, and is exemplified by his misstatement of the *Lemon* test on page 22. The test prohibits "advancing" as well as "inhibiting" religion. This Court noted public school officials "must be certain, given the religion clauses, that subsidized teachers do not inculcate religion." *Lemon*, 403 U.S. at 619. The District's actions were reasonably undertaken to discharge that duty. Violation of the Establishment Clause need not be predicated on a showing of coercion. *Abington v. Schempp, supra*, 374 U.S. at 223.

Petitioner also grossly misleads the Court in his selective citation of *McDaniel v. Paty*, 435 U.S. 618 (1978). Justice Brennan's concurring opinion at page 641 stated "The Establishment Clause, properly understood, is a

shield against any attempt by government to inhibit religion *as it has done here;* . . . " Petitioner deliberately omitted the italicized language, and presented a totally misleading and overstated statement of the law. Ironically, Mr. Justice Brennan went on to warn against "zealots who would inject sectarianism into the political process . . . " 435 U.S. at 642.

The record was quite clear that Christianity was the only religion endorsed in Roberts' classroom, and the principal was justified in taking steps to ensure that religion was not forced on impressionable young students who were required to be present by state law. (App. 20-21a)

> When the power, prestige and financial support of government are placed behind any particular religious belief, the indirect coercive pressure upon religious minorities to the prevailing officially approved religion is plain.

Engel v. Vitale, supra, 370 U.S. at 430-431.

Petitioner states on page 15 of the Petition that "All that Ken Roberts did in the present case was to make this 'necessary' and 'worthy' information available, in a classroom library for optional, personal reading by students" and implies that such action is constitutionally protected. To the contrary, it is not the function of a public school teacher to make his personal religious books available to elementary school students during the regular classroom day. Parents have every right to object to such a practice. The Establishment Clause, as consistently interpreted by this Court, very clearly requires a school district to prohibit such actions by a teacher. *Engle, Schempp, Epperson, supra.*

Neutrality toward religion cannot automatically be equated with hostility toward religion, as Petitioner continually argues. In *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1985), Judge Canby's concurring opinion best dissected the analytical flaws in the argument advanced by Petitioner in cases such as this:

> The analytical difficulty with plaintiffs' approach is that it tends to divide the universe of value-laden thought into only two categories – the religious and the anti-religious. By adopting this dualistic social outlook, and by denominating the anti-religious half of their universe as "secular", plaintiffs erect an insurmountable barrier to meaningful application of the Establishment Clause to controversies like this one.
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> . . .
>
> It is apparent that so long as plaintiffs deem that which is "secular" in orientation to be anti-religious, they are not dealing in the same linguistic currency as the Supreme Court's establishment decision. If the Establishment Clause is to have any meaning, distinctions must be drawn to recognize not simply "religious" and "anti-religious", but "non-religious" governmental activity as well. In the parlance of *Lemon v. Kurtzman*, "secular" must mean "non-religious". Therefore, plaintiffs cannot succeed in demonstrating a violation of the Establishment Clause by showing that the school authorities are somehow advancing "secular" goals.

753 F.2d at 1536. See also, *Developments in the Law – Religion and the State*, 100 Harv.L.Rev. 1606, 1670 (1987).

The arguments in the previous section, as they address cases such as *Stone v. Graham*, are equally applicable to this part of the *Lemon* test. The lower courts

correctly held the lack of use of the books or Bible in the fifth grade curriculum undermined the teacher's argument of a secular purpose. Contrary to Petitioner's assertion on page 19, the School District was not attempting to apply a *per se* rule against Bible reading. Roberts was free to do so on his own time. By his own admission, he clearly could not do so while he was supposed to be teaching fifth grade students. (App. 20a, n.11)

Finally, despite Petitioner's request that the inquiry be focused on the relevant "context," *Lynch v. Donnelly*, 465 U.S. 668, 679, Petitioner's petition is totally devoid of the fact that the relevant context is a fifth grade elementary school classroom. We are dealing with highly impressionable ten- and eleven-year-old children, very easily influenced by their teacher. The fact that students were not required to read the books is not dispositive. As Justice Frankfurter addressed a similar argument:

> That a child is offered an alternative may reduce the constraint, it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children.

McCollum v. Board of Education, 323 U.S. 203, 227, cited in *Wallace v. Jaffree*, 105 S.Ct. 2479, 2492, n. 51 (1984); see, *Bell v. Little Axe Independent School Dist., supra*, 766 F.2d at 1404.

Petitioner completely ignores the interest of parents and students to be free from religious indoctrination. They have a right to expect that the public schools will uphold and implement the First Amendment's mandate

of religious neutrality, *Edwards, supra.* That is precisely what the principal and School District did in this case.

II. Petitioner's Conduct Was Not Protected By The Free Speech Clause Of The First Amendment Nor The Concept Of Academic Freedom.

Firmly established principles determine the outcome of this issue. In matters pertaining to the curriculum, boards of education have been accorded greater control over expression than they may enjoy in other forms of activity. *Board of Educ. v. Pico,* 457 U.S. 853 (1982) (school library); *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 108 S.Ct. 562, 568-70 (1988); *Kirkland v. Northside Independent School Dist.,* 890 F.2d 794 (5th Cir. 1989) (supplemental reading list not a matter of public concern). No case has ever held that a teacher has a constitutional or other right to teach what he sees fit, or to overrule parents' decisions as to which courses their children will take, unless the state has in some manner delegated this responsibility to the teacher. *Mercer v. Michigan State Bd. of Ed.,* 379 F.Supp 580, 586 (E.D. Mich. 1973), *aff'd mem.* 419 U.S. 1081 (1974); *Cary v. Board of Ed. Arapahoe Sch. Dist.,* 595 F.2d 535 (10th Cir. 1979).

A recent case closely analogous to this is the Seventh Circuit decision in *Webster v. New Lenox School District No. 122,* 917 F.2d 1004 (7th Cir. 1990). The plaintiff teacher sought injunctive and declaratory relief claiming his First and Fourteenth Amendment rights had been violated by the school district's prohibition from teaching a non-evolutionary theory of creation in the classroom. The

district court granted defendant's Rule 12(b)(6) motion to dismiss and the Court of Appeals affirmed.

Judge Ripple's analysis emphasized the case did not present a novel issue. He stated "We have already confirmed the right of those authorities charged by state law with curriculum development to require the obedience of subordinate employees, including the classroom teacher." 917 F.2d at 1007. The court rejected plaintiff's argument that the school board must permit him to teach what he pleases. Noting the First Amendment is "not a teacher license for uncontrolled expression at variance with established curricular content," *Palmer v. Board of Educ.*, 603 F.2d 1271, 1273 (7th Cir. 1979), *cert. denied* 444 U.S. 1026 (1980), the court concluded:

> Clearly, the school board had the authority and the responsibility to ensure that Mr. Webster did not stray from the established curriculum by injecting religious advocacy into the classroom.

917 F.2d at 1007.

The same rationale extends to this case. Plaintiff testified at trial that he wanted the right to read whatever book he wanted at any time. (Tr. 51) As previously argued, he clearly has no such right while teaching class. More importantly, here the books at issue are not even arguably related to any approved curriculum in the fifth grade at Berkeley Gardens School.

The Court of Appeals held the district court properly concluded that Petitioner's actions, when viewed in their entirety, had the primary effect of communicating a message of endorsement of religion. (App. 20a) It noted the

three books in question were the only ones in the classroom demonstrated to contain religious themes, and all pertain to Christianity. The Tenth Circuit, contrary to Petitioner's page 16 assertion, did not "single out" the two books for scrutiny. Petitioner singled them out by making them the only sectarian religious books in his personal collection, thereby generating the proper concern of parents and administrators. His use of the Bible, which he kept on his desk in full view of students, to model reading caused the principal to take proper action. Considering those factors in light of the environment of the fifth grade classroom, the Tenth Circuit affirmed the district court's ruling that the books have the "primary effect of advancing religion." It concluded:

> When viewed from the eyes of the children in Mr. Roberts' class, the placement of the two books in the class library, and the placement of Mr. Roberts' Bible on his desk, and Mr. Roberts' reading of the Bible during the reading period provided a "crucial symbolic link between the government and religion." *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 385 (1985).

(App. 21a)

Petitioner's attempt to label this an "academic freedom" case must also fail. On page 20 of the Petition he states "So long as the contents of the books are not harmful to students – as would be the case, for example with inappropriate sexual education materials or matters otherwise destructive of student morals – the teacher retains the academic freedom to maintain a collection of supplemental reading materials free from attempts to censor out books deemed 'unwelcome' because of religious content." There is no legal basis for allowing the

teacher to have two sectarian religious books unrelated to the curriculum as supplemental reading materials for elementary school students. The only authority Petitioner cites for this amazing proposition is part of Justice Brennan's concurrence in *Schempp*, which was made in the context of the permissibility of teaching *about* religion.

The cases previously cited in this section demonstrate that the concept of academic freedom cannot be stretched to cover the subject matter of this case. The boundaries of academic freedom are unclear, and one recent commentator has noted "Constitutional academic freedom should primarily insulate the university in core academic affairs from interference by the state, as opposed to protecting the individual teacher's autonomy." *Byrne*, Academic Freedom: A Special Concern of the First Amendment, 99 Yale L.J. 251, 253 (1989) [cited in *Miles v. Denver Public Schools*, 733 F.Supp. 1410 (1990)]. The same commentator concluded the concept of academic freedom is essentially meaningless in the elementary and secondary school settings, where the primary purpose is to inculcate values in students, and not to indulge in research and the free flow of ideas. *Byrne, supra*, at 288, n. 137.

The context here is a *fifth grade classroom*; a claim of academic freedom to make the two sectarian books available to fifth grade students and a right to display and read his Bible in the presence of those students is illogical and without legal foundation.

The Court of Appeals for the Seventh Circuit rejected nearly identical arguments to those raised by Petitioner in *May v. Evansville-Vandenburg School Corp.*, 787 F.2d 1105

(7th Cir. 1986). Plaintiff claimed the school district's denial of teacher requests to hold prayer meetings on school premises abridged their rights of academic freedom and free speech. The court's opinion stated that the only issue of academic freedom was the right of a public school to operate without interference from the federal courts. It further stated:

> Teachers do not exercise academic freedom when they meet before school opens for a prayer meeting from which students are carefully excluded. They pursue in this setting personal ends unrelated to their role as teachers. They may have limited First Amendment rights but not by virtue of being teachers, and those rights do not include the use of school premises for unauthorized meetings unrelated to teaching.

787 F.2d at 1112.

Petitioner commingles arguments based on alleged students' rights. Students' rights were not an issue in the Tenth Circuit because it affirmed the district court's decision on standing (App. 18a) and are not an issue in this Court because the other plaintiffs did not appeal.

Finally, this Court, in *Edwards v. Aguillard, supra,* recently emphasized courses in public schools were prescribed by the state and teachers were not free, absent permission, to teach courses different from what was required. It stated "Academic freedom at least as it is commonly understood, is not a relevant concept in this context." 107 S.Ct. at 2579, n. 6.

Roberts' actions, if purely personal, do not fall within the concept of academic freedom. If supposedly related to teaching, they violated the Establishment Clause.

III. The Court Should Not Grant The Writ, As This Is A Rare Case.

As previously discussed, very few cases in which the Establishment Clause has been an issue have occurred in elementary schools. To the extent those cases exist, courts have emphasized that the lesser maturity and greater impressionability of elementary students require school districts to take extreme care in preventing Establishment Clause violations. This case does not require the exceptional action of judicial intervention into the affairs of elementary schools. To the contrary, it is one in which established precedent was and must be followed.

CONCLUSION

In view of the foregoing, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

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No. 90-1448

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

KENNETH ROBERTS,
Petitioner,
v.
KATHLEEN MADIGAN and ADAMS COUNTY SCHOOL DISTRICT NO. 50,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTIONS PRESENTED

1. Does the Establishment Clause require a public school to censor a fifth-grade classroom library by banning, from among some 240 volumes, the two books *The Bible in Pictures* and *The Story of Jesus?*

2. Does the Establishment Clause require a public school to censor the personal reading selections of a fifth-grade teacher by forbidding him to read the Bible discreetly and silently to himself during a 15-minute silent reading period in the classroom?

3. Does the Establishment Clause require a fifth-grade public school teacher to hide the Bible in his desk during school hours instead of leaving the Bible among other volumes on his cluttered desk top?

4. Did the public school principal and school district violate the neutrality requirement of the Establishment Clause by ordering a fifth-grade teacher to: a) remove two allegedly Christian books from his classroom library of some 240 volumes; b) stop reading the Bible discretely and silently to himself during a silent reading period; and c) hide the Bible in his desk during school hours?

5. Did the public school principal and school district violate the rights of a fifth-grade teacher to free speech and academic freedom under the First Amendment by ordering him to: a) remove two allegedly Christian books from his classroom library of some 240 volumes; b) stop reading the Bible discreetly and silently to himself during a silent reading period; and, c) hide the Bible in his desk during school hours?

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Constitutional Provisions

U.S. Const. amend. I ..... 1, *passim*

INTRODUCTION

This petition for certiorari poses the question whether the Establishment Clause absolutely forbids from the public school classroom the mere presence of the Bible or accounts of events recorded in the Bible. The specific constitutional questions presented are straightforward, substantial, and unsettled. Respondents disagree, in their Brief in Opposition, with the merits of petitioner's legal arguments. But disagreement between the parties on the merits of a case—a circumstance present in all litigation—does not provide a reason for denying review.

Respondents boldly claim that petitioner "essentially concedes" that the decision below "follows precedents" of this Court. Brief in Opp. at 10. Petitioner's argument, however, is precisely the opposite: the court of appeals has applied the Establishment Clause in this case in a novel manner that runs *contrary* to the principles embodied in the precedents of this Court.

Respondents ignore the fact that this Court has already granted review on very similar constitutional issues in the case of *Lee v. Weisman*, U.S. No. 90-1014 (cert. granted Mar. 18, 1991). In the face of *Lee*, respondents cannot seriously argue that the issues surrounding the application of the Establishment Clause to the public school setting are not worthy of Supreme Court review.

STATEMENT OF THE CASE

The crucial facts in this case are not in dispute. *See* Pet. at 2-7. In light of respondents' attempt to recharactreize the facts, however, *see* Brief in Opp. at 1-5, a brief review of certain key facts is appropriate.

Petitioner Kenneth Roberts, a fifth-grade teacher in the public school system, taught reading to his students. Pet. at 3. Part of this instruction included a 15-minute *silent* reading period. *Id.* During this period, students were free to read books *of their own personal choosing*. *Id.* These books could come from home, from the school library, or from a collection of some 240 books kept in a

classroom collection (the "classroom library"). *Id.* *None* of the countless volumes available to the students necessarily had even the slightest connection to any *other* fifth-grade course, i.e., aside from reading. Tr. 64-65. *All* of these optional reading books, however, *as books*, served as a means of helping students learn to read.[1]

While the students read silently, Roberts would also read *silently* (respondents repeatedly omit this crucial detail) from various books, none of which necessarily had any relation to any curricular matters. Pet. at 5.

Of all of the books available to the students for optional silent reading—from home, from the school library, and from the classroom library—the respondent school principal singled out and banished two books from the classroom library: *The Bible in Pictures* and *The Story of Jesus*. Pet. at 4. Of all of the books available for personal, silent reading by teacher Ken Roberts, the principal singled out one book for banishment from his desk top: the Bible.[2] Pet. at 5-6. The stated reason for both of these acts of censorship was the same: "separation of church and state." Pet. at 4, 6.

At issue in this case, Pet. at 13-24, is the propriety of the principal's extreme "separationist" interpretation of the Establishment Clause of the first amendment.

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[1] Respondents claim that Roberts has "never provided a legally permissible reason" for the use of the challenged books in the classroom library. Brief in Opp. at 3. Surely respondents do not claim that the use of optional reading books to practice reading is illegal.

[2] Principal Madigan objected to Roberts's reading the Bible but did not object to his reading of a book on the life of Buddha. Tr. 34, 65, 68. Respondents attempt to explain away this discriminatory double-standard by claiming that reading about Buddha was excusable because "the class was working on an historical time line," *see* Brief in Opp. at 2. This explanation is absurd: the Bible, with its recounting of significant historical events over thousands of years, is as much or more relevant to a historical time line as is the life of Buddha.

I. IN LIGHT OF THE DECISION OF THIS COURT TO GRANT REVIEW IN *LEE v. WEISMAN* (U.S. NO. 90-1014), WHICH RAISES CONSTITUTIONAL ISSUES THAT DUPLICATE ISSUES IN THE CASE AT BAR, THIS COURT SHOULD EITHER GRANT REVIEW OR HOLD THE PRESENT PETITION PENDING DISPOSITION OF *LEE v. WEISMAN*.

This Court granted review, after the filing of the present petition, in a case presenting very similar constitutional issues. *Lee v. Weisman*, U.S. No. 90-1014 (cert. granted Mar. 18, 1991). This Court should therefore either grant the present petition and consider the case at bar simultaneously with *Lee v. Weisman*, or, in the alternative, hold the present petition pending disposition of *Lee*, and then either grant plenary review or grant the petition, vacate the judgment below, and remand this case for further consideration in light of the decision in *Lee*.[3]

The petition for certiorari in the present case raises the question whether the first amendment requires public school officials to forbid the mere passive presence of three books in a public school classroom: the Bible, *The Bible in Pictures*, and *The Story of Jesus*. Resolution of this case depends upon interpretation of the religion and speech clauses of the first amendment to the United States Constitution. *See* Pet. at i (questions presented). Of particular relevance is the status, and scope, of the three-part *Lemon* test for determining whether official action violates the Establishment Clause. *See Lemon v. Kurtzman*, 403

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[3] This Court regularly employs the technique of deciding one case, and then disposing of pending petitions for certiorari in other cases raising related issues by granting the petitions, vacating the judgments below, and remanding for further consideration in light of the decision of the first case. Instances of this practice are legion. Examples are found in the orders reported at 487 U.S. at 1229-30 (1988) (granting petitions in ten separate cases, vacating the judgments below, and remanding for further consideration in light of eight assorted decisions on the merits).

U.S. 602, 612-13 (1971). *See also* 921 F.2d at 1053-58 (App. 12a-17a, 19a-22a) (application of *Lemon* test by court of appeals); 702 F. Supp. at 1512, 1514-17 (App. 43a-44a, 49a-56a) (application of *Lemon* test by district court). Also of central importance is the question whether, and to what degree, direct or indirect government coercion is necessary to trigger a violation of the Establishment Clause. *E.g.*, 921 F.2d at 1053 (App. 12a) (this case presents "the difficulty of determining the proper balance between the freedom from *religious coercion* created by state-sponsored religion and the inescapable reality that our culture is permeated by religious symbols and rituals") (emphasis added).

These same constitutional issues are currently before this Court in the pending case of *Lee v. Weisman*, U.S. No. 90-1014 (cert. granted Mar. 18, 1991). The *Lee* case involves the permissibility, under the Establishment Clause, of a clergy invocation at a public school graduation ceremony. The questions presented in *Lee* are the following:

> (1) Do school authorities violate Establishment Clause by allowing speaker at a public school or high school graduation ceremony to offer invocation and benediction that acknowledge deity?
>
> (2) Is direct or indirect government coercion necessary element of Establishment Clause violation?

This Court's disposition of the *Lee* case will obviously have very significant implications for the present litigation. The decision in *Lee* will likely provide a clarification, and possibly a revision, of the *Lemon* test. In addition, *Lee* will likely clarify the status and meaning of the "endorsement" test articulated by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668, 688-92 (1984) (concurring opinion), as well as the scope of permissible "accommodation" of religion.

In short, the forthcoming decision of this Court in *Lee v. Weisman* should provide the most recent, authoritative statement on the meaning of the Establishment Clause in

the context of the public schools. Given that the present case also involves, first and foremost, the application of the Establishment Clause to the public school setting, resolution of the case at bar should not be divorced from the pending *Lee* case.

This Court should therefore either grant review in the present case, in order to allow for consideration of this case in conjunction with *Lee v. Weisman*; or, in the alternative, this Court should hold the present petition pending disposition of *Lee*, and thereupon either grant plenary consideration of the present case or simply grant the petition, vacate the decision of the Tenth Circuit, and remand this case for further consideration in light of the decision of this Court in *Lee v. Weisman*.

II. THE DECISION OF THE COURT BELOW RESTS UPON AN EXTREME MISINTERPRETATION OF THE ESTABLISHMENT CLAUSE.

As explained in the petition for certiorari, the decision of the court of appeals in the case at bar adopts an extremist view of "separation of church and state"—a view that, in the present case, "insisted on the *obliteration* of all Christian books from the school premises." 921 F.2d at 1063 (App. 32a) (Barrett, J., dissenting).

Respondent school officials have not attempted to explain away the extreme "separationist" view of the court of appeals; instead, these officials embrace this view and argue that the Constitution compels such a stance.

In essence, the school officials have adopted a position of constitutional despair; finding themselves unable to draw a distinction between unconstitutional *indoctrination* and constitutional *education*, these officials resort to a categorical prohibition on all mention of God or Judeo-Christian history in the classroom.

The school officials deny that they have adopted a *per se* rule against the mere presence in the classroom of any books that mention God or portray historical events or

figures with religious significance. *See* Brief in Opp. at 14 (books in the classroom library); *id.* at 18 (books on the teacher's desk). But the clear import of the officials' arguments, and of the decision below, is that all "religious" books and ideas must be expelled from the public school classroom.

The record provides no warrant for concluding that Ken Roberts used the challenged books for proselytization or indoctrination. Pet. at 4-7. Roberts neither steered the children in their selection of reading materials, Tr. 24, nor read aloud or alerted students when he read the Bible to himself, Tr. 32-33. The principal, moreover, made no inquiry regarding the use of these books. Pet. at 4, 6. The condemnation of the three challenged books—a condemnation which the court below affirmed—therefore amounts to a *per se* objection to the mere presence of these books. *See* 921 F.2d at 1058 (App. 21a) ("placement" of the books in the classroom violated the Establishment Clause).

The school officials persist in embracing this *per se* rule of exclusion. These officials take issue with the "availability" of the challenged books, Brief in Opp. at 14, charging that the mere "placement" of these books in the classroom was unconstitutional, *id.* The officials equate the mere presence of the Bible on Robert's desk [4] and his silent "personal reading" with unconstitutionally "*teaching* religion," *id.* (emphasis in original). The officials state that the mere presence of these books "endorsed" Christianity, and that making these books "available" is objectionable. *Id.* at 16. Ironically, the school officials find fault with the "*lack* of use of the books or the Bible," *id.* at 12 (emphasis added),

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[4] Respondents misleadingly refer to "display" of the Bible. There is no evidence that Roberts "displayed" the Bible. On the contrary, Roberts always had various papers and "at least five or six books" on his desk, Tr. 32, 34, 65-66; the Bible was not "prominently displayed"—indeed, as Roberts testified, "Half the time I couldn't find it. . . . My desk is pretty cluttered with papers and books and lesson plan books, and pencils and many other things." Tr. 66.

yet deny that they are applying a "*per se* rule," *id.* The officials equate the *availability* of information with "indoctrination," *id.*, and with "teaching," *id.* at 19, 23. The officials demand that Roberts "conceal" the Bible, *id.* at 4, 21, and charge that merely "allowing the teacher to have" the challenged books in the classroom "as supplemental reading materials" is illegal and unconstitutional, *id.* at 21-22.

A. Curricular vs. noncurricular books

The respondent school officials rely heavily upon an asserted distinction between "curricular" and "noncurricular" books. *See* Brief in Opp. at 2, 13-15, 18, 20, 22. This distinction lacks constitutional significance.[5]

The Establishment Clause does not classify the use of books as curricular or noncurricular; nor is it at all obvious whether a supplemental reading list—which is what, in essence, the classroom and school libraries are—is or is not a part of the reading curriculum.[6] Furthermore, if the Constitution forbids *allowing* a student to read the Bible, it is very difficult to see why it would not also forbid *requiring* that student to read the same book as part of a compulsory course of "curricular" instruction. Yet this Court has repeatedly approved the use of the Bible—or other texts with religious significance—as part of a regular course of public school study. *See* Pet. at 13-14 (citing cases). It follows logically that such books

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[5] This distinction also lacks a basis in the record. The principal banished the Bible, *The Bible in Pictures*, and *The Story of Jesus* from the classroom "because of separation of church and state," Tr. 28, 120; Brief in Opp. at 3, and "[t]o avoid the appearance of teaching religion," App. 65a (Ex. 12), *not* because these books were "noncurricular." Indeed, it would have been absurd to evict these volumes as "noncurricular" while allowing a multitude of other "noncurricular" books—everything from *Fog Magic* to *Charlie Brown's Cyclopedia* to *Events that Shook the World*—to remain in the classroom. *See* Tr. 64-65 (other books were not curriculum-related); App. 68-70a (listing volumes in classroom library).

[6] Resting constitutional decisions upon the elusive distinction between 'curricular" and "noncurricular" materials would create a litigation nightmare.

are not inherently "dangerous," and that students may be permitted to read them voluntarily either for independent study or purely for the sake of practicing reading.

The crucial constitutional distinction is between *indoctrination*—which is forbidden—and *education* (i.e., the neutral provision or explanation of information)—which is permitted. Whether a teacher improperly proselytizes in a course designed for that purpose ("curricular") or while keeping miscreants after school ("noncurricular") is constitutionally irrelevant. And whether a Bible is properly assigned in a comparative religion course ("curricular") or simply made available for personal selection from a collection of over 200 books ("noncurricular") is likewise irrelevant.

B. Religious vs. nonreligious books

The censorship the school officials claim is constitutionally necessary would require school administrators—and courts—to identify which books are "religious." The unworkability of such a rule appears in the case at bar.

The undisputed testimony in this case was that the classroom library contained books on Greek mythology and on Indian religion. Tr. 51. *Accord* 921 F.2d at 1055 (App. 15a). Roberts took the view that these were "religious" books, *id.*, and that other books in the classroom library also had "religious" contents reflecting a variety of religions. *See* Tr. 51, 64, 140-42. The school itself categorized a variety of books on "religion and mythology" together in the school library. Tr. 97 (testimony of school librarian). Yet when the principal undertook to enforce "separation of church and state" in Roberts's classroom, she "ignored the presence of books dealing with Greek gods and goddesses and American Indian religions." 921 F.2d at 1055 (App. 15a). The district court and court of appeals also ignored the presence of these other books and declared that *The Story of Jesus* and *The Bible in Pictures* were the only religiously oriented books in the classroom library. 921 F.2d at 1057 (App. 21a); 702 F. Supp. at

1513 (App. 47a). Respondents enthusiastically embrace this selective definition of religion. Brief in Opp. at 2, 21.

Are courts, then, competent to decide that Greek mythology has lost its status as a religion, presumably because of a lack of adherents? May a federal court assume, as the district court did, the authority to dismiss "the tenets of a little known religion such as those followed in American Indian culture," as "far less influential on young students" and therefore not a religion for purposes of the Establishment Clause? *See* 702 F. Supp. at 1517 (App. 56a). If so, are teachers free to try to indoctrinate these "little known" beliefs?

Respondent Madigan, when asked whether "religious books" have no purpose in a public school classroom, agreed that "[c]ompletely religious books, *Christian* completely religious books like the ones [at issue]," did not belong in a classroom. Tr. 143 (emphasis added). The rule of this case, then, is that the strictures of the Establishment Clause only apply to "a modern day, widely observed religion which is a recognizable part of our society." 702 F. Supp. at 1517 (App. 56a).

But that is not the rule under the precedents of this Court. A teacher may no more try to indoctrinate paganism than Presbyterianism. It is the *effort to proselytize* that unconstitutionally threatens the trust parents repose in school officials, *see Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (noting the "understanding that the classroom will not *purposely* be used *to advance religious views*") (emphasis added); the popularity of the religion in question is immaterial.

C. Classroom vs. school library

The school officials' rule of absolute censorship would also necessarily apply to the school library (as principal Madigan's alleged removal of the Bible from the school library would indicate, *see* Pet. at 7).

The school officials do not attempt to forge an exception, under their *per se* rule of exclusion, for school

libraries. Nor would such an exception be consistent with the theory of the school officials, which treats "religious" books as inherently harmful.

If the very *presence* of the challenged books within the grasp of fifth grade students is, as the court of appeals held, unconstitutional, then these books are the constitutional equivalent of asbestos or radioactive waste—which cannot be countenanced in either the classroom *or* the school library. If the very *presence* of the Bible on Roberts's cluttered desk top violates the Constitution because students might notice the book, then it must also be unconstitutional to maintain this dangerous volume in the school library. According to respondents, schools must be certain, as principal Madigan testified, that students do not get the impression that "reading a Bible . . . was something that they might do [or] that was appropriate for them to do." Tr. 150; *see also* Brief in Opp. at 4.

In short, the decision below rests on the extreme view that the Bible and other texts describing events or people with religious significance are absolutely forbidden from public school classrooms *and* libraries. This Court should grant the petition for certiorari in this case to review this outlandish interpretation of the Establishment Clause.

CONCLUSION

This Court should grant the petition for certiorari or, in the alternative, should hold this petition pending disposition by this Court of the case of *Lee v. Weisman*, U.S. No. 90-1014 (cert. granted Mar. 18, 1991), and thereupon either grant plenary review or grant the petition, vacate the decision of the court of appeals, and remand for further consideration in light of the decision of this Court in *Lee v. Weisman*.

Respectfully submitted,

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